

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND) MDL NO. 13-02419-FDS
COMPOUNDING)
PHARMACY CASES LITIGATION)
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BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

STATUS CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 2
One Courthouse Way
Boston, MA 02210

December 13, 2013
11:04 a.m.

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PROCEEDINGS

THE CLERK: All rise. Thank you. Please be seated. Court is now in session in the matter of In re: New England Pharmacy Company, Incorporated Products Liability Litigation. This is Case Number 13-MD-02419.

Counsel, please note your appearances for the record. We'll start with the PSC.

MS. PARKER: Good morning, your Honor, Kristen Johnson Parker with Hagens, Berman, Sobol, Shapiro for the plaintiffs' steering committee.

11:04AM

THE COURT: Good morning.

MR. STRANCH: Good morning, your Honor, Gerard Stranch, Branstetter, Stranch & Jennings for the plaintiffs' steering committee.

MS. DOUGHERTY: Good morning, your Honor, Kim Dougherty with Janet, Jenner & Suggs for the plaintiffs' steering committee.

MR. CHALOS: Your Honor, Mark Chalos for the plaintiffs' steering committee.

11:05AM

MR. ELLIS: Rick Ellis for various plaintiffs.

MR. FENNELL: Good morning, your Honor, Patrick Fennell from Roanoke, Virginia for the plaintiffs' steering committee.

THE COURT: Good morning, all.

1 MR. LEADER: Bill Leader, National Tennessee
2 for individual plaintiffs.

3 MS. TAYLOR: Kiersten Taylor from Brown,
4 Rudnick.

5 THE COURT: Did someone put me on speaker?
6 Thank you. Mr. Gottfried.

7 MR. GOTTFRIED: Michael Gottfried from Duane
8 Morris for the trustee, Paul Moore.

9 MR. KLARFELD: Joshua Klarfeld, Ulmer, Berne
10 for GDC.

11 THE CLERK: Mr. Fern.

12 MR. FERN: Good morning, Judge,
13 Frederick Fern, especially-appointed counsel on behalf
14 of the trustee.

15 MR. RABINOVITZ: Dan Rabinovitz on behalf of
16 MSM. Thank you.

17 MR. GAYNOR: Robert Gaynor, Sloane and
18 Walsh, on behalf of the affiliates, the individuals.

19 MR. MORIARTY: Good morning,
20 Matthew Moriarty for Ameridose.

21 MR. TUCKER: Scott Tucker for Ameridose.

22 MR. TRANEN: Daniel Tranen for the trustee.

23 THE CLERK: That's it.

24 THE COURT: Good morning, all. We have
25 several dozen people on the telephone, as usual. I've

1 received the jointly-proposed agenda. We have a number
2 of things to talk about today, but in keeping with past
3 practice, I think it makes sense to follow the agenda,
4 so let's start with update on subpoenas and objections.
5 Ms. Parker.

6 MS. PARKER: Mr. Fennell will speak to that,
7 your Honor.

8 THE COURT: All right. Mr. Fennell.

9 MR. FENNELL: Good morning, your Honor,
10 Patrick Fennell, again, from Roanoke, Virginia for the
11 plaintiffs' steering committee. As your Honor I'm sure
12 knows, the plaintiffs' steering committee served about
13 88 healthcare providers with subpoenas back in June of
14 2013.

15 Objections and motions to quash were
16 referred to the magistrate judge for resolution. On
17 November 13, the magistrate judge issued her ruling on
18 the objections and motions to quash. She did narrow the
19 scope of the subpoenas in some ways, and she held that
20 all clinics had to provide documents reflecting
21 communications with NECC about warnings and recalls.

22 She also ruled that any clinic that is a
23 party in the MDL or has a patient who has filed suit is
24 in the MDL or has given notice of a claim must comply
25 with the full subpoena as it was amended by the

1 magistrate judge, and that was to be done within 30 days
2 of the date of her order. The 30-day deadline is
3 actually today. As of the close of business yesterday,
4 approximately 17 clinics had responded by filing
5 something in the document repository.

6 Some clinics have already announced the
7 position that the plaintiffs' steering committee feels
8 is contrary to Judge Boal's ruling, and we anticipate
9 that the plaintiffs' steering committee will be
10 addressing those issues in the coming days, perhaps with
11 some motions to compel, but we'll be evaluating that in
12 the next few days. That's where we stand on the
13 subpoenas.

14 THE COURT: All right. Anyone else want to
15 be heard on the topic of the subpoenas?

16 (No response)

17 THE COURT: All right. Item 2 is status of
18 mediation efforts.

19 MS. PARKER: Yes, your Honor, a short report
20 on that one. The entities who have opted into mediation
21 are moving forward with that. The mediation I think to
22 date has been subject to several orders of this Court,
23 including on fee sharing. That went in I believe since
24 the last status conference. Mediation is moving
25 forward, and we have nothing but positive things to

1 report.

2 I will note that Liberty, Liberty Industries
3 Limited, I'm equivocating slightly on the formal name of
4 the entity, forgive me.

5 THE COURT: This is the manufacturer of the
6 clean room?

7 MS. PARKER: That's correct, your Honor.
8 Liberty has opted into the mediation program. They have
9 filed a notice on the docket informing people of that.

11:09AM 10 They have done that since the plaintiffs' steering
11 committee filed its master complaint and its short form
12 complaint.

13 The plaintiffs' steering committee took the
14 position with entities who've opted into mediation that
15 we would not encourage plaintiffs to name them in
16 complaints at this point in time. We recognize that if
17 they fall out of mediation, that may need to be
18 addressed on the back end.

19 The plaintiffs' steering committee has,
11:10AM 20 therefore, filed a corrected short form complaint that
21 omits counts against Liberty but retains the remainder
22 of the counts that were filed in the original short form
23 complaint.

24 Plaintiffs' steering committee has also done
25 a significant amount of outreach to plaintiffs' lawyers

1 individually to inform them that Liberty has opted into
2 mediation and to suggest that they not be named in the
3 short form complaints.

4 THE COURT: Who, which entities are in the
5 mediation program at this point?

6 MS. PARKER: Liberty, Victory, ARL, and I
7 believe three clinics, four clinics, Orlando Pain
8 Management, West Orange, which is another Florida
9 clinic, I believe the South Bend Clinic was in mediation
10 but has now opted out of mediation and then one other
11 pain clinic.

12 THE COURT: All right. Anything further on
13 the mediation piece?

14 (No response)

15 THE COURT: All right. Let's turn to the
16 master complaint and responsive pleadings.

17 MS. PARKER: As I mentioned, your Honor, the
18 short form complaints against unaffiliated defendants
19 are due to be filed on December 20th, and I want to
20 clarify for the benefit of those attorneys on the phone
21 that that deadline applies to plaintiffs with cases on
22 file in the MDL already, whether filed here directly or
23 transferred here, as well as plaintiffs who wish to be
24 considered for potential bellwether pools, that deadline
25 applies.

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THE COURT: I'm sorry, back up. One thing that I'm not entirely clear on at this stage is -- well, I guess I want to walk through this one step at a time. We have any number of complaints filed in different courts around the country. Some of those plaintiffs, obviously, are going to adopt the short form complaint. I have indicated they do not need to file a motion under Rule 15 to do so.

11:12AM

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What universe of those complaints, of those cases are going to be incorporated in the short form complaint? Are there any plaintiffs who are not going to incorporate the short form complaint, and, if so, what do we do with that?

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MS. PARKER: I don't know that I can speak to that conclusively, your Honor. I can tell you that in speaking with plaintiffs' attorneys about the short form complaint and just to update them on the MDL status generally, my impression is that the vast majority, if not all them, intend to file short form complaints.

11:13AM

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Now, each short form complaint may wind up being slightly different. For example, there's an option to add additional counts or to retain previous counts that were identified in the original complaint, but my sense of things is that if not all plaintiffs'

1 counsel, the vast majority of plaintiffs' counsel intend
2 to adopt the short form complaint.

3 THE COURT: Is it your sense that any
4 plaintiff who does not adopt a short form complaint
5 essentially goes to the back of the line, for example,
6 for purposes of bellwether trials and so forth?

7 MS. PARKER: I think that would be our
8 position, your Honor, though certainly if there were
9 plaintiffs' counsel who felt that their case should be
10 considered for bellwether but for some reason had not
11 filed a short form complaint, the PSC would be willing
12 to speak with that attorney, of course, but the
13 structure imagined was that we would be working from
14 short form complaints when it came time to select
15 bellwether pools.

16 THE COURT: One of the reasons I adopted
17 this process and did not make it mandatory on the
18 thinking that plaintiffs are masters of their complaint,
19 and I can't really force someone, I don't think, to
20 adopt a particular complaint, but I hadn't thought
21 through the consequences of what happens if you don't.

22 Obviously I don't want to make any
23 additional work for anyone, including myself, but this
24 proceeding is at a stage where certain things have to
25 happen, including teeing up motions to dismiss and so

1 forth, and to the extent we are not using this master
2 complaint, short form complaint form, it does get
3 awfully complicated, and there are certain cases in
4 which there are pending motions to dismiss or even
5 motions for summary judgment.

6 I guess let me ask about that. What happens
7 to the pending motions to dismiss or motions for summary
8 judgment, are they rendered moot with the adoption of a
9 short form complaint in your view?

11:15AM 10 MS. PARKER: Our proposal would be that they
11 would be rendered moot by the filing of a short form
12 complaint but without prejudice to raising those
13 arguments again, your Honor, once the short form
14 complaints have been filed. If I may for just a moment?

15 THE COURT: Yes.

16 MS. PARKER: As your Honor, I think,
17 referred to, the idea of the short form complaints was
18 to provide some uniformity to counts so that we could
19 group plaintiffs and evaluate them for bellwether
11:15AM 20 purposes.

21 THE COURT: One of the purposes.

22 MS. PARKER: One of the purposes, yes, thank
23 you, your Honor. The idea behind the bellwether
24 selection, of course, is that you can identify
25 representative claims that are representative of a

1 number of plaintiffs on file that can then be tried
2 efficiently. That may have import then on how remaining
3 plaintiffs' claims are dealt with, so our suggestion
4 would be that any existing motions to dismiss or motion
5 for summary judgments would in fact be mooted by the
6 filing of a short form complaint, but, as I say, those
7 issues could certainly be raised later.

8 THE COURT: Again, this is intertwined,
9 obviously, with the issues raised by St. Thomas. I
10 mean, to put it simplistically, this case is, to my
11 mind, unusual and complicated in kind of an odd way. We
12 don't have a central defendant, so to speak, at least
13 for practical purposes.

14 I mean, I guess in a normal product
15 liability case, you have either a central defendant or a
16 central product or both, and there are issues, you know,
17 did it cause the injury, was the company negligent, is
18 there individual causation and so on?

19 We kind of have a donut here, we have a hole
20 in the middle of the case in that we have this small
21 company that in effect no longer exists. Obviously,
22 there's a bankruptcy proceeding. I am not privy to
23 what's going on, but I have to say I would not be
24 surprised if, for example, whatever insurers there are
25 have tendered the limits of the policy, but that raises

1 the question what is a bellwether case? Where is this
2 case going? What are these things going to look like?
3 We have affiliated parties. We have perhaps Liberty,
4 perhaps UniFirst, these individual pain clinics.

5 I'm having trouble, and maybe nobody knows
6 the answer to this at this stage, I'm having trouble
7 even conceptualizing what the central issues are going
8 to be at the end of the day and whether those are issues
9 that are going to rise under Tennessee law, Virginia
10 Law, Michigan law, whatever, but before we get to those
11 issues, I do need to, as in any case, resolve motions to
12 dismiss, get discovery underway to the extent
13 appropriate and so on.

14 I think the time has come to get organized
15 along those lines beginning with the resolution of
16 motions to dismiss, creating a framework for that so
17 they can be decided and we can move on.

18 What I hope to accomplish in some reasonably
19 short term is exactly that, to know what the universe of
20 short complaints are and to permit defendants who so
21 intend to have their 12(b)(6) motions or other
22 preliminary motions resolved, either they win or they
23 lose, and we go on from there.

24 MS. PARKER: If I may, your Honor?

25 THE COURT: Yes.

1 MS. PARKER: There has been a bifurcation of
2 sorts in this case certainly. The plaintiffs' steering
3 committee has filed a master complaint that named
4 certain unaffiliated defendants, and there are deadlines
5 associated with that master complaint against the
6 unaffiliated defendants, including the December 20th
7 deadline to file short form complaints against the
8 unaffiliated defendants, and also a January deadline for
9 motions to dismiss the master complaint by the
10 unaffiliated defendants.

11:19AM

11 THE COURT: To dismiss the master complaint,
12 but that doesn't quite answer it because the way it's
13 framed, for example, the pain clinics, as I understand
14 the structure of the master complaint, are identified
15 but not necessarily defendants?

16 I guess I can't quite figure out where the
17 individual pain clinics fit in that scheme of things. I
18 mean, there's a listing of clinical defendants, there's
19 a listing of different claims that are made against them
20 generically, but I don't think you could move to dismiss
21 the master complaint without a short form complaint as
22 well, right?

11:20AM

23 MS. PARKER: I think that's right, your
24 Honor, at least insofar as the pain clinics are
25 concerned, so we have spoken with the pain clinics about

1 how we deal with that issue. The plaintiffs' steering
2 committee has no objection to providing some manner for
3 clinics to tee up in a global fashion motion to dismiss
4 issues that would affect all short form complaint
5 clinics. We've been having that discussion with them
6 about what makes sense, what deadlines make sense, how
7 we would go about doing that.

8 Clinics, also, of course, will have an
9 opportunity to move to dismiss individual short form
10 complaints. The plaintiffs' steering committee would,
11 of course, prefer that this be addressed globally to the
12 extent that there are issues that are cross-cutting as
13 opposed to issues that are attended to a particular
14 plaintiff.

11:20AM 15 THE COURT: Well, obviously speaking for
16 myself, I would like to resolve issues globally as well,
17 but sometimes it's not as neat as that. All right.
18 Remind me, the master answer/response is due when?

19 MS. PARKER: I believe it's January 9th,
11:21AM 20 your Honor, but, unfortunately, I don't have my schedule
21 in front of me. If any other counsel would like to
22 correct me on that, please do.

23 THE COURT: I have it in my notes here,
24 January 8th, I think.

25 MS. PARKER: Thank you.

1 THE COURT: No, I'm sorry, I'm looking at
2 the wrong calendar, January 10th. I think I ruled at
3 the last status conference that those were due
4 January 10th.

5 MS. DOUGHERTY: Your Honor, if I may?

6 THE COURT: Yes.

7 MS. DOUGHERTY: We're struggling as much as
8 you are with the conundrums that you've raised today,
9 and we're all trying to sort out efficient answers to
10 the process.

11:22AM

11 Generically in the plaintiffs' steering
12 committee's experience, the generic issues are teed up
13 in motions to dismiss, and those are heard in sort of
14 the first phase, but where there are case-specific
15 issues with respect to motion to dismiss, such as a
16 statute of limitation problem, those are uniformly dealt
17 with after the case is selected for bellwether, and
18 that's usually the way that we see things work.

19 Generic issues are dealt with up front, for
20 example, if the clinic thinks that they just essentially
21 aren't liable to any plaintiff in that we cannot proceed
22 on our claim of conspiracy, for example, they would tee
23 that up because that would apply to all of the
24 plaintiffs, however, if there are case-specific issues
25 with respect to a particular plaintiff, those are always

11:22AM

1 usually stayed until the time when that case is selected
2 for bellwether, and so that's sort of in our own mind
3 what we had envisioned the process would be, and perhaps
4 that helps your Honor as well, if that makes sense to
5 you.

6 THE COURT: Well, I was certainly thinking
7 along those lines, although, again, I guess two
8 observations: Number 1, when you begin to look at
9 actual cases, the division between global and individual
10 cases sometimes is more blurred than we would like it to
11 be.

12 The second point is that deciding legal
13 issues in the abstract is sometimes dangerous without a
14 factual context, but I can state with considerable
15 confidence that I know next to nothing about Tennessee
16 or Virginia law, but if a pain clinic in Tennessee or
17 Virginia is sued on seven counts, and they say at a
18 minimum five of them ought to be dismissed, they have
19 the right to do that and have me decide that, and maybe
20 I agree, maybe I don't, but that issue needs to be
21 resolved, and as with any defendant, they have a right
22 to say that the complaint fails to state a claim upon
23 which relief can be granted, and they ought to be let
24 out.

25 I have no idea whether or not any defendant

1 can be so let out. At this point, I simply want to
2 create a framework for making that happen without undue
3 delay.

4 MS. GREER: Your Honor --

5 THE COURT: Yes.

6 MS. GREER: -- Marcy Greer for the St.
7 Thomas entities.

8 THE COURT: Yes. Can I get you to come up
9 to the podium and speak into the mic. so everyone can
10 hear you?

11:24AM

11 MS. GREER: Of course, your Honor. I didn't
12 know if you were ready to hear from me or not.

13 THE COURT: Maybe not every issue you
14 raised, but on this one, go ahead, yes.

15 MS. GREER: Of course. I think we're all
16 dealing with the same conceptual basis, which is that a
17 defense or a claim or something that applies against all
18 the plaintiffs in a certain category should be addressed
19 upfront.

11:25AM

20 The proposal that we have is that those
21 would not be addressed as to any of our defendants until
22 after bellwethers are chosen, or at least the initial
23 pool is chosen, and that's where we have a problem
24 because if you look at the 100 complaints, and I
25 wouldn't ask the Court to have to do this, the 100 plus,

1 against the Tennessee defendants, all of them state
2 vicarious liability counts against our clients in the
3 form of alter ego or parent agency, things like that.
4 They're all the same.

5 Those are generic against our clients, and
6 they should be resolved at the beginning. That's kind
7 of, as the Court has indicated, why you do a master
8 complaint process at all, but the proposal has been
9 we're going to do short form complaints that include
10 you, and I'll bet you 100 plus of those short form
11 complaints will all contain the same allegations, but
12 there's no process for us to move against them.

13 Now, they've said, well, we'll entertain
14 contain a global motion after the bellwether pool is
15 picked, we will entertain a global motion as to one of
16 those and will consider whether to apply it to other
17 cases. That's what we're trying to avoid.

18 I don't want to speak for our co-defendants.
19 I know STOPNC, Howell Allen, et cetera, who are all in
20 these same cases with us have filed motions directed to
21 certain counts, but they are also all the same under
22 Tennessee law, and there are issues that can be decided
23 as a matter of law once and for all, which is the
24 purpose of doing this in an MDL as opposed to
25 seriatim.

11:26AM

11:26AM

1 THE COURT: Right. Unless somebody
2 convinces me otherwise, I want to do this in sort of a
3 linear way. I want to do Rule 12(b)(6) motions. If
4 some of them should be postponed because they are so
5 idiosyncratic that there is no value to deciding them
6 now, fine, we can put those on hold, but something that
7 cuts across 100 cases or 50 cases or 25 cases, it seems
8 to me ought to be resolved now.

9 It's a 12(b)(6) standard. It may be that I
10 say, you know, I can't resolve this now or it states a
11 claim, and we'll take it up again on summary judgment,
12 but I want to do -- conceptually we'll do motions to
13 dismiss, we'll do discovery, we'll do summary judgment,
14 we'll have a trial.

15 There are lots of wrinkles along the way
16 because it's an MDL, but that's the basic framework I
17 want to follow here. Obviously we're going to focus at
18 some point on a handful of cases because we can't
19 prepare a thousand cases for trial. I'm certainly going
20 to adopt the bellwether process, but I think we're a
21 ways away from that at this point.

22 Let me ask, Ms. Greer, this question. You
23 have master answers or responses due on January the
24 10th. Should I simply set a deadline for the filing of
25 motions to dismiss?

1 MS. GREER: Actually, your Honor, we do not.
2 Right now there is not a live master pleading against
3 us. We are specifically not mentioned in the master
4 complaint, and in the short forms, they are supposed to
5 fill in the blanks and then I assume add in all the
6 vicarious liability and agency allegations and counts,
7 and then we have to respond to 100 plus of those and
8 deny them, and we're kind of back at the same point
9 where we started when we had the first hearing in
10 October.

11:28AM

11 THE COURT: Not necessarily. The master
12 complaint is long, okay. I can't say that I'm
13 intimately familiar with it. You're certainly mentioned
14 by name.

15 MS. GREER: We are not named, your Honor, in
16 the master complaint.

17 THE COURT: Well, there's certainly
18 something called St. Thomas that's in the master
19 complaint.

11:29AM

20 MS. GREER: It's our co-defendant, and
21 that's St. Thomas Outpatient Neurosurgical Center.

22 THE COURT: All right. Regardless, as of a
23 week from today, let's say you get 100 short form
24 complaints, and maybe some of them are actually long,
25 even though they're called short form. How do you

1 propose that I handle your responses to those 100 short
2 form complaints, which presumably name your client,
3 otherwise you don't care, right, it's only if you're
4 named?

5 MS. GREER: Correct.

6 THE COURT: How do you think I ought to
7 proceed?

8 MS. GREER: My suggestion would be if they
9 file a single short form complaint that has counts in it
10 and says this is our form, which is not what's on file
11 now, but if they did and said people can elect into
12 these counts so that we would have something to operate
13 against globally, we would file a master short form
14 answer or a master answer, however you want to do it.

15 We proposed a Tennessee-only complaint.
16 They've done 100 plus of them, and they're all very
17 similar, so I don't think it would be that hard to get
18 to something, but what we're asking for is a single
19 document that has the allegations in it that deal with
20 vicarious liability and agency issues so that we can
21 respond to that with a motion to dismiss, and if the
22 Court wants to answer that, we can answer that, too, and
23 then do short form answers in all of the cases where
24 it's been filed, where it's been adopted, and the short
25 form answer would simply say we adopt, you know,

1 everything in the short form answer except this.

2 THE COURT: So you're saying there should be
3 in effect a middle stage between the master and the
4 short form complaint so that you have --

5 MS. GREER: If that's the way they want to
6 do it. Our proposals were actually either do a
7 Tennessee-only master complaint, which we were perfectly
8 fine with, or put counts in the master, as it is, amend
9 it to include counts that plaintiffs can opt in or out
10 of.

11:30AM

11 They didn't want to do either of those, and
12 they said, well, we'll bring you in in the short form
13 answers, which puts us back in a situation of having to
14 answer all those short form complaints, excuse me.

15 THE COURT: Well, is there any way to handle
16 this? I mean, let's say you get 100 short form
17 complaints, if your 100 complaints are all the same, I'm
18 guessing your 100 short form complaints are going to be
19 pretty identical as well.

11:31AM

20 Is there some vehicle, some way -- I'm
21 sorry, I'm stumbling over my own words here. I am
22 reluctant to set up a new form of master and short form
23 complaint because it's going to take certainly months to
24 do that. I don't want to do that. I don't want to
25 spend the time.

1 I'd rather try to figure out a way in which
2 expeditiously and with unnecessary waste of resources a
3 Tennessee or Virginia or Michigan defendant can answer
4 100 complaints, 50 complaints and tee up the issues for
5 resolution by a 12(b)(6) motion. There must be some way
6 to do this.

7 MS. GREER: Well, I have another idea. This
8 is kind of on the fly.

9 THE COURT: Lay it on me.

11:32AM

10 MS. GREER: It is this: Have them amend the
11 master short form complaint, have the master short form
12 complaint contain the vicarious liability allegations
13 and counts in it, and then when they do the short form,
14 when each individual short form complaint is filed, they
15 will say we opt in to everything that's in the master,
16 everything that's in the short form in paragraphs, you
17 know, 5, 6, 7, 8, and we want punitive damages, and we
18 don't want to seek lost wages. That's how they tailor
19 it, then we will respond to those in a true short form
20 answer which says we opt into everything we said in our
21 master short form answer.

11:32AM

22 I mean, semantics put aside, this would work
23 without having to disturb what's already in place, and
24 it would address the issues here. It kind of gets to
25 the Tennessee only, but they could build in: Here are

1 the Tennessee counts, here are the Virginia counts, here
2 are Florida, whatever is necessary in that document.

3 Now, we'd have to probably move those
4 deadlines a little bit to make it all happen, but then
5 that way we would be filing in individual cases the
6 truly individual documents which are, if plaintiff
7 Jane Doe says, you know, I want to opt in to these
8 counts of these pleadings, this is the relief I want,
9 oh, and I want to add one more thing that's particular
10 to me, she does that, then we come back and say, you
11 know, we've already filed everything, we adopt that in
12 full, and, by the way, there's an issue with notice
13 that's particular to her that doesn't go to all --

14 THE COURT: Let's say I do that. Let's say
15 I direct plaintiffs to file --

16 MS. DOUGHERTY: Your Honor, I believe the
17 Tennessee plaintiffs have a response and a possible
18 solution as well.

19 THE COURT: All right.

20 MR. STRANCH: Your Honor, what we've
21 proposed and the way we think this should work from an
22 efficiency point of view, we're not saying that they
23 can't file global motions to dismiss. We've actually
24 set out a specific time to do it. What we've said is
25 after we go through the selection of those cases that

1 are going to go into a discovery pool, and that's going
2 to be --

3 THE COURT: We're not going to wait for a
4 selection of cases, I want this done upfront.

5 MR. STRANCH: Okay. Well, your Honor, I
6 mean, we're talking --

7 THE COURT: 12(b)(6), again, we're going to
8 basically follow the Rules of Civil Procedure. Right
9 upfront, if you're a defendant, you have a right to file
10 a motion that says this does not state a claim upon
11 relief can be granted. I may deny them all, I don't
12 know what I'm going to do, but you have that right, and
13 I'm going to give them right.

14 MR. STRANCH: Your Honor, the short form
15 Tennessee complaints are going to be filed next week,
16 and it's my understanding that every lawyer is going to
17 be filing those short form complaints, and it's my
18 understanding also that those short form complaints are
19 going to be very uniform as it relates to allegations
20 against the big St. Thomas entities, and what we've
21 proposed, and we can move the timing around, is that
22 they file any global motions that they belief they have
23 against that, and we can designate one case.

24 We propose that it be those that go into the
25 discovery pool, but we can designate a case earlier and

1 say file your motion against this case, and we'll agree
2 that every case that raises those issues, which I
3 suspect will be all Tennessee cases, will then be
4 affected by it, and so if the motion is granted, we
5 propose that we would then agree that all those cases
6 that are affected by it, that they would be dismissed in
7 those, and there would be no need to file additional
8 global motions in those cases.

11:35AM 9 THE COURT: What I'm struggling with is
10 why -- and I guess this question is directed to you,
11 Ms. Greer, why can't you file a document that says
12 motion to dismiss all claims of X, Y and Z as to the
13 following 100, you know, short form complaints? Let's
14 say you say that there should be no vicarious liability
15 under Tennessee law.

16 MS. GREER: We can do that, but that wasn't
17 the proposal. The proposal was we'll think about
18 whether it applies in these other cases. I mean, what
19 we want is one -- I mean, it's going to be a lot of
11:36AM 20 extra work because we're going to have to go through all
21 100 and make sure because they're filed by different
22 lawyers, sometimes they state things just a little bit
23 differently or they have one paragraph off.

24 I mean, it's easier if we could have a
25 specimen to operate against, if they could designate

1 that, that would help tremendously so that we could say,
2 you know, as they say in paragraph X, otherwise I think
3 it will be a nightmare for the Court to follow what
4 we're saying and where it comes from, but if they would
5 designate a specimen short form and say that it's
6 binding as to all, then -- and we can have it upfront
7 before we go down the road of discovery and bellwethers,
8 we can work with that.

9 THE COURT: Isn't the problem -- let's say I
11:36AM 10 direct that there be a short form Tennessee complaint
11 and short form Virginia complaint, short form Michigan,
12 short form Florida and so forth, while those have to be
13 developed, right, people have to meet, talk about it,
14 develop it, then they have to meet with their clients, I
15 don't know whoever it is has to decide, yes, we're going
16 to join this, no, we're not going to, and isn't all of
17 that going to take some period of time, which ordinarily
18 would be fine, but if the point of this exercise is
19 efficiency and saving resources and trying to cut to the
11:37AM 20 quick, have we really gained anything as opposed to, I
21 guess, and I'm thinking out loud here --

22 MS. GREER: No, I hear your Honor, and this
23 is what we tried to avoid back in October, instead,
24 they've gone off in this direction, so it's not that we
25 didn't try to stop this from happening, we tried to set

1 out an orderly process. We raised this immediately,
2 but -- and I understand, we are where we are, and I
3 don't want to make work for anyone either, but I do want
4 to get us in a situation where we can file a global
5 motion to dismiss the purely vicarious liability claims
6 against our client and have that heard because if we're
7 right, and we believe we are, there's a very strong
8 standard in Tennessee, then we shouldn't be here, and we
9 shouldn't be doing bellwether, we shouldn't be doing
10 discovery. We have answered discovery.

11:37AM

11 We're not saying that we're not going to go
12 along with it as long as we're in the case, but by the
13 same token, we think that should be heard early.

14 THE COURT: But, again, suppose you file a
15 document that says motion to dismiss, we dismiss all
16 claims of vicarious liability in the following listed
17 100 short form complaints, however framed or phrased,
18 then you file a memorandum in support that talks about
19 the issue under Tennessee law, they oppose it.

11:38AM

20 I say, you know, yes or no, and either you
21 win or you don't, but it applies to those 100 cases, and
22 let's say you win, you are now presumably out of those
23 100 cases. Yes, there may be some nuance. There may be
24 some quibbling about whether it applies to this case,
25 never mind the clinic that's in Crossville or wherever

1 the other, you know, Tennessee plaintiffs are located.
2 We can cross that bridge when we come to it.

3 This doesn't seem to me to be an
4 insurmountable hurdle, and my strong suspicion is that
5 everyone is going to be cutting and pasting from the
6 same word processing documents either way, and so we're
7 probably to get to the same process regardless of what
8 path we take.

9 You know, from my standpoint, you know, I'll
11:39AM 10 probably have a Virginia motion to dismiss and a
11 Michigan motion to dismiss and so forth, and they're
12 going to raise multiple issues of state law as to which
13 I am going to be starting from square 1, but so be it.

14 My -- I just want a rational vehicle for
15 getting to that point.

16 MS. GREER: I agree, and I think that could
17 work, your Honor, we just needed your blessing and
18 shared understanding of how that process would work.

19 THE COURT: I guess part of this is, and
11:39AM 20 this applies to both sides, I do want everyone to be
21 careful, but I also understand that there may be a
22 glitch here and there where someone has missed some
23 nuance in some case, and we can maybe fix some problems
24 after the fact if in fact, you know, the attorney
25 representing one plaintiff from the Crossville clinic

1 was raising a somewhat different claim and it got lost
2 in the shuffle, we can dust that off and revisit it in
3 the future.

4 MS. GREER: Kind of like a cooperation
5 clause in a contract?

6 THE COURT: Yes, I guess. Does anyone else
7 want to be heard on this topic? Again, this is one of
8 the problems of not having a normal lead defendant, so
9 to speak, or at least -- well, it's not a normal case,
10 as you all know.

11:40AM

11 Is there someone, for example, representing
12 Virginia or Michigan or Florida defendants or from
13 another jurisdiction who wants to be heard on this
14 topic?

15 (No response)

16 THE COURT: All right. I hear nothing but
17 silence. Here's going to be my working assumption then.
18 When the master responses are due, which is on
19 January 10th, that's the deadline for responding to the
20 master complaint.

11:40AM

21 Well, let me take it a step at a time.
22 Should that also be the deadline for filing motions to
23 dismiss or other answers or responses to short form
24 complaints that were filed by December 20th?

25 MS. PARKER: From the plaintiffs' steering

1 committee suggestion, that makes sense so long as we're
2 talking about global motions to dismiss that would be
3 raising these cross-cutting issues that we talked about.

4 THE COURT: Yes.

5 MS. GREER: Your Honor, we can file our
6 master motion to dismiss at that point, and I'll let the
7 STOPNC defendants speak for themselves, but that
8 shouldn't be a problem, then do we have to also answer
9 all those because under normal 12(b)(6) procedure, that
10 suspends your answer, but we're kind of in a different
11 world here. If we need to do short form answers --

12 THE COURT: My assumption is if you file a
13 motion to dismiss, you don't have to answer.

14 MS. GREER: Okay.

15 MR. STRANCH: Your Honor, we have one issue
16 with that that's going on here. Tennessee, as you know,
17 has a one-year statute of limitations.

18 THE COURT: Yes, that's another wrinkle in
19 all of this. Yes.

20 MR. STRANCH: We have been told by some of
21 the defendants in Tennessee that they believe that some
22 of our plaintiffs have service problems and notice
23 problems with their complaints. Because we're not
24 getting answers early on, they may run out of time to
25 fix those errors if there truly is a service error or

11:41AM

11:42AM

1 truly is a notice error.

2 What we've proposed in our process to follow
3 to have streamlined this is that the defendants provide
4 us a list of those cases where they believe there is a
5 service or a notice problem under our state statutes so
6 that people can look at it and decide if they want to
7 fight that out or if they want to just go correct it
8 while they still have time to correct it.

9 THE COURT: Why wouldn't that be included in
10 the January 10th response? I mean, normally a motion to
11 dismiss for insufficient service of process or failure
12 to serve is made in a Rule 12 motion, it's like a motion
13 to dismiss.

14 MS. PARKER: We would be fine with that,
15 your Honor, except it's case-specific, so it's not a
16 large problem with service, it's case-specific, and so
17 we propose that they provide us just the list and what
18 they think is wrong by letter so that people can look at
19 it and decide do they want to try to fix it, do they
20 think they did it right, and then they have an
21 opportunity to do that.

22 If there's a service of process issue and
23 someone did serve the wrong person by accident and the
24 Court finds that, the Court under our current scheduling
25 is not going to get to that until it's too late to

1 correct it. Normally that would be taken up at the
2 beginning of a case when there's still an opportunity to
3 correct it.

4 THE COURT: Right. Ms. Greer.

5 MS. GREER: I'm not sure -- I think that
6 they're passed limitations because that ran in October,
7 but, you know, we can certainly entertain that.

8 THE COURT: My understanding is that all of
9 these medical events, let's put it that way, basically
10 happened September, October, that time frame a year ago,
11 so that year has passed. That doesn't necessarily mean
12 that every one-year limitations period has run.

13 MS. GREER: Well, the CDC recall was in
14 early October though, and by then everybody was on
15 notice.

16 THE COURT: That may be the answer, but I
17 can't say for certain as to whether or not anyone who
18 hasn't filed yet is precluded. There may be other
19 wrinkles, as you know, in any limitations-type defense,
20 but it does seem to me to at least try to tee this issue
21 up as well even though it's not global and
22 individualized so that if there is a service of process,
23 either failure to serve or inefficiency of service of
24 the type of motion that would be normally made in a
25 Rule 12 context to have that fleshed out relatively soon

1 as well. I don't see any reason not to do that given
2 the circumstances.

3 MS. GREER: Sure. I think we can come up
4 with something to handle that.

5 MR. STRANCH: Your Honor.

6 THE COURT: Yes.

7 MR. STRANCH: We'd also like to make sure
8 that includes the pre-suit notice under our medical
9 malpractice statutes because there is a time frame in
10 which people can correct those if there's a problem.

11:44AM

11 THE COURT: In other words, a failure to
12 make that pre-suit notice?

13 MR. STRANCH: Or if they made it, and
14 there's going to be an argument about you didn't use
15 their full middle name, you used an initial, and we
16 require strict compliance. If they intend to raise
17 that, let's go ahead and correct those while there's
18 still time do those, and so we'd like them just to give
19 us a list of cases where they believe they have that
20 problem and what it is so that we can weigh out whether
21 this is something we want to just take head on or
22 whether it's something that we want to correct.

11:45AM

23 THE COURT: Your vision is that I issue some
24 sort of order requiring all defendants to indicate in
25 any pending case whether there is either a service of

1 process issue or failure to give notice under state law?

2 MR. STRANCH: That's correct.

3 THE COURT: Issued by a particular date and
4 identifying the name of the case and the --

5 MR. STRANCH: What the perceived defect is.

6 THE COURT: What the perceived issue is.

7 Ms. Greer.

8 MS. GREER: I can't speak for all the
9 defendants obviously, but I believe we can work

11:45AM

10 something out.

11 THE COURT: Is January 10th a fair time
12 frame for that?

13 MR. STRANCH: We would actually ask that it
14 be earlier, your Honor. It's my understanding from
15 talking to the lawyers, some of the defense lawyers,
16 that they already have those lists, they just have so
17 far refused to share them with us.

18 MS. GREER: Your Honor, that's not the case.
19 I mean, we don't have a list, we just have a notice here
20 and there. We're going to have to go through every
21 single one and determine whether both the notice and the
22 service were adequate, and so we would ask that at least
23 January 10th.

11:46AM

24 THE COURT: Does anyone else want to be
25 heard on this topic, that is, the service of process

1 issue?

2 (No response)

3 THE COURT: All right. Here's what I'm
4 going to do. I will separately issue an order, and I
5 want to think through how it's phrased, that will
6 require any defendants seeking to make -- to raise a
7 defense concerning service of process or failure to give
8 notice, and it seems to me that has to apply to a subset
9 or to cases that have been filed by I guess

11:47AM 10 December 20th, right, otherwise it doesn't make any
11 sense.

12 MR. CHALOS: Your Honor, would it be helpful
13 to submit some proposed language on that?

14 THE COURT: I certainly won't throw it in
15 the trash. How quickly could you do that?

16 MR. STRANCH: We'd be happy to do that, your
17 Honor.

18 THE COURT: I would like to move quickly on
19 this.

11:47AM 20 MR. STRANCH: We'll get it to you by Monday,
21 your Honor.

22 THE COURT: Ms. Greer, do you want to submit
23 something by Monday?

24 MS. GREER: Sure, I'd be happy to take a
25 look at their language and see if we can work with that.

1 THE COURT: All right. As far as the
2 deadline, I think it won't be any later than
3 January 10th. Whether it's going to be earlier or not,
4 I'll have to see. That will be separate from this issue
5 of what I'll call the global issues. I want to
6 again --

7 MS. GREER: Your Honor, could I make one
8 last point?

9 THE COURT: Yes.

11:48AM

10 MS. GREER: It's already December 13th, and
11 a lot of people are gone for the holidays. Some of this
12 information we may need because service went through the
13 hospital, so we'll do our best, but we really ask that
14 it not before January 10th to make sure we've got all
15 the full information.

16 THE COURT: That's my concern is it's
17 complicated under any circumstances, and we do have the
18 holidays, and --

11:48AM

19 MS. GREER: We have a lot of people who have
20 use it or lose it vacation policy, and it wouldn't be
21 fair to force them to...

22 MR. STRANCH: Your Honor, we're happy to
23 consider a later date if we can get an agreement from
24 the Tennessee counsel that will toll it as of today or
25 some period very shortly in the near future because

1 we're under real time constraints ourselves, and we
2 don't want someone to find out they've got a problem
3 that could have been fixed if they just found about it
4 five days earlier.

5 THE COURT: Why don't you talk to one
6 another and see if you can agree on language or narrow
7 the field of conflict. I don't conceptually have a
8 problem with that. I can make it February 10th and
9 everyone agrees that the time period is tolled for 30
10 days or whatever the relevant time period is. I don't
11 have a problem with that.

11:49AM

12 Then in terms of what is due on
13 January 10th, I guess my concept here is that any
14 Rule 12 motion that applies to, what should I say, more
15 than one case, more than five cases, should I put a
16 number on it?

17 MR. STRANCH: We would suggest that that be
18 global as to those defendants' claims.

19 THE COURT: Well, if 99 out of 100
20 plaintiffs are raising the same claim, I want to deal
21 with that up front. The idea is to not get tangled in
22 idiosyncratic ideas or claims.

11:50AM

23 MR. STRANCH: How about a substantial number
24 of the cases against the defendant?

25 THE COURT: Substantial number, does that

1 sound right to you, Ms. Greer?

2 MS. GREER: That sounds right.

3 THE COURT: I'm making you the de facto lead
4 because I don't have anyone else to talk to.

5 MS. GREER: That works for us, your Honor.
6 To be clear, we would simply identify the cases that it
7 would operate against as an attachment to the motion to
8 dismiss.

9 THE COURT: My concept is you would move to
11:50AM 10 dismiss and say it applies to this type of claim, a
11 vicarious claim, for example, in the following cases.

12 MS. GREER: That won't count against page
13 limits?

14 THE COURT: That's the least of my worries
15 right now. That would be in the motion and then a
16 memorandum in support would address the issue once.

17 MR. STRANCH: We're willing to agree on page
18 extensions, your Honor.

19 THE COURT: So far there have been lots of
11:51AM 20 pleadings, but none of them have been, you know, of the
21 150-page variety other than the master complaint.
22 Again, we have to turn square corners on some of this.
23 I need to know exactly what you are asking me to do in
24 what cases, and so when I issue an order, it applies to
25 particular claims, particular cases and so on.

1 I mean, you're free to dismiss all the
2 claims in every case. If you think the law supports it,
3 I'm not going to stop you, but you have to identify them
4 and work these through one-by-one. I will issue a
5 separate order on that as well that clarifies what is to
6 be filed by January 10th, but the thrust of it will be
7 global motions to dismiss by any defendant.

8 Now, just to alarm myself, this applies, of
9 course, to cases in which short form complaints have
10 been filed by December 20th. Liberty, I guess, has
11 opted into the mediation program. I don't know what the
12 status of UniFirst is. Again, we may be adding
13 defendants here that have not yet been served or entered
14 an appearance, and I guess we'll take that in due course
15 as the issues arise.

16 MS. PARKER: Yes, your Honor, I would
17 suggest that counsel for the plaintiffs' steering
18 committee will discuss with counsel for UniFirst whether
19 UniFirst will be in a position to file any other similar
20 global motions to dismiss by that January deadline. We
21 do recognize though, that would be a voluntarily move on
22 UniFirst counsel's part, and I don't mean to suggest
23 they've agreed with it, but we can certainly propose it
24 to them.

25 THE COURT: We have issues with, I mean,

1 this medication may fail, we may have lots of different
2 iterations of this. Right now those defendants who want
3 to file in effect global motions to dismiss, who want to
4 do so, I'll give them that opportunity, and for want of
5 a better idea, I'm going to do it with this framework.

6 I guess I'm getting a little off the agenda
7 here, but let me -- well, anything else on the master
8 complaint, short form complaints, motions to dismiss?

9 MS. PARKER: Unfortunately, yes, your Honor.

11:54AM

10 The plaintiffs' steering committee, the affiliated
11 defendants and the trustee all heard this Court very
12 clearly when you said at the last status conference that
13 you want to know whether we are litigating against the
14 affiliated defendants by the January status conference.

15 With that in mind, the parties have
16 continued to negotiate. The parties have though,
17 mindful of that January deadline, agreed to certain
18 additional extensions of time, specifically, the
19 plaintiffs' steering committee has agreed not to press
20 its motion for discovery against the affiliated
21 defendants.

11:54AM

22 THE COURT: This is the one that has been
23 pending for some time?

24 MS. PARKER: The one that has been pending
25 for some time. We have agreed that the affiliated

1 defendants may have until January 8th, which is two days
2 before the January status conference, to oppose or
3 otherwise respond to the plaintiffs' motion to take
4 discovery, and the affiliated defendants have likewise
5 agreed to extend the tolling period through the
6 January status conference.

7 We recognize that the master complaint
8 against the affiliated defendants is currently scheduled
9 to be filed on December 20th. Given these additional
10 extensions and that we've agreed until January 8th to
11 let the affiliated defendants respond, the parties have
12 discussed and feel that it would be appropriate for the
13 master complaints against the affiliated defendants to
14 also be filed on January 8th.

15 That would get it on file before the
16 January 10th status conference, and it would have a
17 filing at a point in time where we would have a much
18 better sense of whether or not there will be a
19 resolution with the affiliated defendants, so while the
20 plaintiffs' steering committee has no interest in
21 protracting this, we do also want to give fair due to
22 the prospect of resolving this by the January 10th
23 status conference.

24 If we did agree to extend that deadline,
25 your Honor, the plaintiffs' steering committee would not

1 come back and ask for an additional deadline. That
2 would be the deadline, and the complaint would be filed
3 on that date.

4 THE COURT: All right. I'm sorry, can you
5 identify yourself.

6 MR. BLUMBERG: Jay Blumberg from the Premier
7 defendants in New Jersey. My understanding is that the
8 last time that the Court put the deadline at
9 December 20th for the affiliated defendants is because
10 the unaffiliated defendants also have claims, and we
11 need to know whether we have to third-party these people
12 in or their cross-claims, which is why the December 20th
13 date was set and then the January 10th date was set for
14 our responses.

15 So if that is going to take place, the
16 unaffiliated defendants are going to need additional
17 time with regard to pressing their claims because the
18 PSC may not have a claim against or may settle their
19 claims with the affiliated defendants, but the
20 unaffiliated defendants still have claims against them.

21 THE COURT: I guess let me ask Ms. Parker,
22 this has kind of proceeded in an odd way that maybe I
23 didn't intend at the beginning of the process with the
24 affiliated defendants carved off from everyone else and
25 has lead to anomalies such as the one or potential

1 anomalies such as the one identified.

2 If this is a question of just getting the
3 document on file, why should that wait until
4 January 8th? In other words, other than the amount of
5 work necessary to get it done, if there is additional
6 work, what harm is there filing it on December 20th?

7 MS. PARKER: Let me recognize that the
8 representative for the trustee may also wish to address
9 that issue. I don't know, but he certainly may. To be
10 very frank about it, your Honor, I'm not sure what
11 effect filing that master complaint will have on the
12 settlement discussions.

13 I could see it having a positive effect, I
14 could see it having no effect, it could have a negative
15 effect, I suppose. Our thought was --

16 THE COURT: I would guess that you're going
17 to accuse the affiliated defendants of --

18 MS. PARKER: Some malfeasance.

19 THE COURT: -- some malfeasance?

20 MS. PARKER: Yes, we certainly will, your
21 Honor. There are some insurance coverage concerns, I
22 believe, that could theoretically be raised by the
23 master complaint against the affiliated defendants that
24 would have some bearing conceivably on the settlement
25 discussions, and I'll leave it to the trustee's

11:58AM

11:58AM

1 representative to address that further, if he wishes.

2 MR. GOTTFRIED: So, your Honor, this may be,
3 with your permission, a good time to just sort of give
4 you, A, some sense of where things stand --

5 THE COURT: I would be delighted with that
6 since I don't have a sense where things stand.

7 MR. GOTTFRIED: -- and tell you, first of
8 all, the trustee supports the PSC's request to extend
9 the date to January 8th, and, indeed, would be
10 supportive of a later date. I would inform the Court
11 that we've reached agreement with NECC's primary and
12 excess insurers subject to final documentation, which
13 will be facilitated by the finalization of settlements
14 with the individual defendants.

11:59AM

15 We've reached agreement with one of the
16 insurers for another affiliated defendant, and we are
17 close with yet another affiliated defendant insurers.
18 The process with respect to negotiating those individual
19 settlements is continuing. The creditors' committee is
20 engaged in that process. A full meeting of the
21 creditors' committee, which includes Attorney Sobol and
22 Lipton, who are also on the PSC, is scheduled for next
23 week to discuss the various issues regarding the insider
24 settlement.

12:00PM

25 The trustee is available to participate, as

1 requested, in that meeting, and we believe that we're
2 making progress, and we believe the PSC's request to
3 defer would help facilitate the progress I think the
4 trustee is making.

5 THE COURT: All right. What I'm going to do
6 then is I'm going to accept the proposal, that is, the
7 master complaint against the affiliated defendants shall
8 be filed by January the 8th. The deadline for opposing
9 the PSC's motion for discovery from way back when is
10 extended to January 8th. I'm sorry, I don't have the
11 docket number at my fingertips. Actually, I may.

12:01PM

12 MS. PARKER: Your Honor, I believe you
13 already entered a stipulation that included that date
14 extension.

15 THE COURT: I did. All right. Does that
16 include the tolling as well?

17 MS. PARKER: Yes, it did, your Honor.

18 THE COURT: What was the -- I'm sorry, this
19 is the motion to partially lift the discovery stay was
20 Docket Number 534, and I did extend it to January 8th.
21 That's been extended, the tolling agreement, and then do
22 I need to enter a new order extending the deadline for
23 the master complaint against affiliated defendants to
24 January 8th?

12:01PM

25 MS. PARKER: Yes, your Honor, that would

1 need an order.

2 THE COURT: All right. We'll let the chips
3 fall where they may and take it from there. Yes, sir.

4 MR. BLUMBERG: I guess the question then
5 becomes, Judge, will that affect the time period in
6 which the unaffiliated defendants have to respond?

7 THE COURT: In other words, you're concerned
8 about having two days in which to --

9 MR. BLUMBERG: Yes.

12:02PM 10 THE COURT: -- potentially... why don't we
11 do this. I'm going to leave things where they are for
12 now, and I will entertain, if necessary, an emergency
13 motion to provide relief if it becomes necessary.

14 MR. BLUMBERG: Very well.

15 THE COURT: All right. Anything else on the
16 motions to dismiss master complaints, short form
17 complaints?

18 MS. PARKER: Mercifully, no.

19 THE COURT: All right.

12:02PM 20 MR. LEWIS: Judge --

21 THE COURT: I'm sorry, who is this?

22 MR. LEWIS: This is Jason Lewis of Mason,
23 Georgia, and I represent Forsyth Street Ambulatory
24 Surgery Center, and I know that we had said that we
25 wouldn't have any questions here, but there was some

1 conversation earlier that I would just be remiss if I
2 didn't ask this question.

3 It seems that there was some language
4 potentially expecting a response of defendants -- well,
5 I shouldn't even call them defendants but clinics that
6 are identified in the master complaint but who have not
7 been served and have not received a lawsuit against them
8 at any point. That was expected by January 10th?

9 THE COURT: Well, if you haven't been
10 served, you don't need to respond. My intention here is
11 that any complaint that is served by December 20th will
12 be responded to by January 10th. That is, you've served
13 the complaint, you've adopted the short form complaint,
14 your response is due January 10th. If you haven't been
15 served yet, you don't have an obligation to respond.

16 MR. LEWIS: Absolutely. I just wanted to
17 confirm that was right. Thank you, Judge.

18 THE COURT: Now, if there's a dispute about
19 that, as we've discussed, I'm going to separately issue
20 this order that if there's some question about service
21 of process, I'm going to in some form or another make
22 defendants provide a list, if you think there's an issue
23 in that regard, and we'll try to sort it out then. I
24 don't know what else to do. I can't make you respond to
25 a complaint that you haven't been served with.

1 MR. LEWIS: Absolutely, thank you.

2 MR. STRANCH: Your Honor, we have one other
3 docket-keeping issue on the master complaints and short
4 form complaints.

5 THE COURT: Yes, sir.

12:05PM

6 MR. STRANCH: This is really for the relief
7 of the clerk's office and the lawyers. Under Tennessee
8 law, there's a requirement that you attach to your
9 complaint certain documents to meet our prefiling
10 requirements. All the Tennessee cases that we're aware
11 of have already been filed and did attach those to the
12 original complaints, so we either filed a proposed order
13 with the Court last night or it will be filed here
14 shortly that allows the Tennessee plaintiffs to adopt
15 that by reference so that we're not required to attach a
16 thick set of additional documents to every short form
17 complaint when they're already in the record, and we
18 wanted to bring that to the Court's attention and see if
19 that was acceptable.

12:05PM

20 THE COURT: It certainly sounds sensible,
21 but I don't have the power to modify Tennessee law.
22 Ms. Greer, do you have a view?

23 MS. GREER: Well, again, I can only speak
24 for my client, but I think we could work something out
25 on that. We did get the proposal but hadn't had a

1 chance to respond, and we felt like there was a lot to
2 be worked out before that point.

3 THE COURT: Here's what I'm going to do. If
4 Tennessee law requires that these documents be included,
5 they need to be included in some form or another. If
6 there is an existing complaint that is going to be
7 superseded by the adoption of the short form complaint,
8 and those documents are on file and otherwise in
9 accordance with Tennessee law, and this applies to the
10 law of any state, not just Tennessee, if that's what the
11 law requires, I will permit plaintiffs to adopt those
12 items by reference, and if it appears in the future that
13 you can't do that under Tennessee law, if the law
14 permits, I'll give an opportunity to cure. Will that
15 work?

16 MR. STRANCH: Yes. Thank you, your Honor.

17 MR. LANG: Your Honor, can I ask a
18 clarifying question?

19 THE COURT: Yes, sir, I'm sorry, who is
20 this?

21 MR. LANG: My name is Joseph Lang. I'm an
22 Attorney in New Jersey.

23 THE COURT: Yes.

24 MR. LANG: I represent two physicians that
25 have been named in these complaints, and I have filed

1 motions for dismissal at this point. They're not global
2 issues, they are issues that pertain specifically to
3 physicians in New Jersey wherein an affidavit of merit
4 is required to be served at some point in time after an
5 answer is filed.

6 Will that motion be heard along with the
7 other general motions, or am I going to have to wait on
8 the hearing of my motions?

9 THE COURT: And so is the issue that you
10 represent two physicians and this issue applies only to
11 those two physicians?

12 MR. LANG: Correct.

13 MR. FENNELL: Your Honor --

14 THE COURT: Yes.

15 MR. FENNELL: -- Patrick Fennell for the
16 plaintiffs' steering committee. I think I can speak on
17 behalf of the plaintiffs' lawyer in those cases. They
18 have filed short form complaints in those cases which do
19 not include those doctors or the individual doctor as a
20 defendant in the short form complaint, and their
21 position on this is that renders the motion to dismiss,
22 at least to those defendant doctors, moot.

23 THE COURT: Did you hear that Mr. Lang?

24 MR. LANG: I did. I don't necessarily agree
25 with that, but I did hear that.

1 THE COURT: Let me leave it this way for
2 now. I don't think it's fair for the physicians to be
3 in the case if either, A, plaintiffs don't intend for
4 them to be in the case; or, B, they ought to be
5 dismissed as a matter of law, and I will give an
6 opportunity for the defendant, if required, to make such
7 a motion early on, even if it only applies to two
8 physicians, but I'm going to put that issue on hold for
9 the time being. We'll see what is filed by

12:08PM

10 December 20th, and you can look at it and formulate your
11 position, and we'll take it from there.

12 MR. LANG: Okay. Thank you. Excellent.
13 Thank you, your Honor.

14 THE COURT: Just because I have to do
15 something, I'm going to deem any case in which a motion
16 to dismiss or motion for summary judgment was filed and
17 then a short form complaint has subsequently been
18 adopted, I'm going to deem those to be denied without
19 prejudice to their renewal. I don't know any other way
20 to handle that to clean that up. Okay.

12:09PM

21 At some point we'll have to go through the
22 docket and pick those out one-by-one. It's without
23 prejudice. It's simply an administrative tool in order
24 to try to simply file this. I recognize, like with
25 Mr. Lang's clients, there may be cases that are not

1 "global" because they involve one clinic, one physician
2 or even one plaintiff, and I'll try to deal with them as
3 fairly and expeditiously as possible.

4 MR. LANG: Great. That's all I can ask for,
5 your Honor.

6 THE COURT: Expeditious in this context may
7 have a different meaning than it does in another
8 context, but I'll do the best I can.

9 [Laughter]

12:09PM 10 THE COURT: All right. Let me, I guess,
11 talk about discovery which intersects with this question
12 of the bellwether cases and the issues raised by the
13 St. Thomas defendants.

14 My somewhat simplistic, perhaps, view of
15 this is that the parties ought to be permitted to engage
16 in discovery with one another, putting aside whatever
17 discovery needs to be stayed, if there's a motion to
18 dismiss pending or so on, but, speaking generically, the
19 process should not be one-sided.

12:10PM 20 Even the affiliated companies, or for that
21 matter, at some point the bankrupt entity itself are
22 going to have to produce discovery somehow in some form,
23 and I don't see any reason why that process cannot at
24 least get underway in some rational form.

25 Let me start with discovery from the

1 plaintiffs. There is, I understand it, a dispute, at
2 least a dispute between the St. Thomas defendants and
3 plaintiffs as to what information ought to be provided
4 and at what stage.

5 I do not see that all discovery ought to be
6 stayed as to, that is, discovery from the plaintiffs,
7 pending selection of bellwether cases. That doesn't
8 make any sense to me at all. Obviously, you cannot
9 select bellwether cases without understanding what your
10 options are, and that includes the defendant being able
11 to discover from the plaintiffs various pieces of
12 information.

13 I think a plaintiff fact sheet of some kind
14 is desirable or standardized interrogatories or
15 something in which the requests, more or less, looks the
16 same, and I don't see why we can't have standard forms
17 of authorizations for medical records or employment
18 records, if that's relevant in protective orders.

19 It's not clear to me how we get from there
20 to here exactly. As I understood the dispute, it's
21 plaintiffs want to provide less information, and
22 defendants want to obtain more, and I guess my starting
23 point is I think fact sheets are desirable.

24 I think the fact sheet ought to have a
25 reasonable amount of detail. The negotiation of those

1 exact questions might have to be resolved by either me
2 or a magistrate judge, but some reasonably detailed fact
3 sheet with relevant information should be produced, and
4 I don't see why authorizations cannot be executed for
5 things such as medical records or product I.D. records.

6 I think plaintiffs' depositions ought to be
7 probably put on hold for the time being while we sort
8 out these other issues, but, again, I don't think the
9 discovery process should be one-sided.

12:13PM

10 I'm simply stating a starting point, not
11 necessarily an ending point, and I'm sure I'm saying
12 things simplistically, but I would like to have some
13 reasonably standardized process that gives defendants
14 sufficiently substantial information that they can
15 evaluate cases, among other things, for bellwether
16 purposes and that plaintiffs not control which cases
17 discovery occurs in.

18 Ms. Parker or someone from the PSC, let me
19 hear your position on this issue. Mr. Stranch.

12:14PM

20 MR. STRANCH: Yes, your Honor,
21 Gerard Stranch for the PSC. We have proposed that there
22 will be a plaintiff profile form sheet and a medical
23 records release that we provided to the defendant early
24 on for all of the cases that are pending as of
25 December 20th, and what we've proposed that plaintiff

1 form sheet be is the PITWD, the personal injury and
2 wrongful death addendum from the bankruptcy court
3 filing, and this is the information that the bankruptcy
4 judge found was necessary to determine how much her
5 claim is worth when the bankruptcy court will be sending
6 money out to people, so this -- or allowing claims or
7 disallowing claims, and so with the form, that would
8 give the defendants basic biographical information on
9 the plaintiffs.

12:15PM

10 It would also give the defendants
11 information about what their underlying medical
12 condition was, who treated them, what product they
13 received, what their claimed injury is as a result of
14 that, whether they had lost wages, whether they were on
15 disability at the time that this occurred or whether
16 they were employed. It provides substantial basic
17 information about the plaintiff.

12:15PM

18 The medical records release that we have
19 provided, that we've suggested be used as part of that
20 also would allow the defendant to then go get all the
21 medical records from this period of time relating to
22 this, and so they'll be able to know, you know, exactly
23 what were they treated from, how much were those bills
24 that are related to that, and so it provides enough
25 information, we believe it's a substantial amount of

1 information, and we can hand up this form to you if
2 you'd like to see the form that we've proposed.

3 THE COURT: Sure.

4 MS. PARKER: I'll note that it has some
5 handwriting, scribblings.

6 MR. STRANCH: We believe that two of those
7 provide more than enough information for defendants or
8 clinic defendants to look at those various ones and pick
9 which cases they believe should go into a full discovery
10 mode, which would have the more end up uniform plaintiff
11 fact sheet, it would have depositions and other things
12 at that time.

13 With that document you're looking at now,
14 your Honor, they would receive a medical records release
15 as well signed by the plaintiff.

16 THE COURT: What about employment records?

17 MR. STRANCH: Well, we think it's only
18 relevant if someone makes a lost wage claim, and on that
19 form, it says are you making a claim for lost wages,
20 and, if so, how much, and so the defendants are able to
21 see what the lost wage claim is, and then when the case
22 is selected to go into a discovery pool, then there
23 would be an employment record release for those that are
24 claiming it, there would be greater authorizations on a
25 case-by-case basis, you know, for example, someone

1 shouldn't sign a disability release for disability
2 records if they're not on disability, and so what we've
3 said in all those authorizations is we're not
4 categorically saying no, all we're saying is when it
5 goes into the discovery pool, we'd look at each case and
6 decide which ones of the negotiated releases makes sense
7 for this plaintiff, and the example I will give you is
8 if one of my plaintiffs, for example, is a retiree and
9 hasn't worked in ten years, there's not going to be
10 employment information that's going to be relevant to
11 that claim, there's not going to be disability
12 information that's relevant to that complaint, and so we
13 think -- or education that's relevant to that claim.

12:17PM

14 You know, education records wouldn't be
15 relevant to that claim, you know, and so we believe that
16 that should be dealt with on a case-by-case basis once
17 the plaintiff is in a full discovery pool, and we are
18 happy to negotiate the terms of those authorizations so
19 that there is kind of a standard form, but whether it's
20 used on each plaintiff, we think should be dealt with on
21 an individualized basis instead of a requirement that
22 everybody has to sign every one.

12:18PM

23 THE COURT: Ms. Greer, do you want to
24 respond to this? Again, I'm turning to you by default,
25 but you did raise some of these issues in your

1 pleadings.

2 MS. GREER: Yes, your Honor, I'm happy to
3 address it. The problem with the form that was
4 developed by the bankruptcy court for evaluating claims
5 is it doesn't give the kind of information that's
6 necessary to make bellwether decisions, and I want the
7 Court to be very clear that when they talk about this
8 discovery pool, they're talking about six cases out of
9 100, and I believe that applies only to the Tennessee
10 plaintiffs from Nashville, but that's the universe that
11 we're talking about. We would only get real discovery,
12 if you will, on those plaintiffs.

13 Now I've selected for the Court the
14 plaintiffs' fact sheets that have been approved, and
15 these are public record documents, in five or six
16 different type MDLs. Here's ours, which you have, and
17 if you want another copy, I'm happy to hand that up.

18 THE COURT: Could you hand it up, please. I
19 have it here somewhere.

20 MS. GREER: Your Honor, if I could
21 substitute a clean copy of the addendum that they're
22 using. I notice that there's handwriting on the back of
23 that document that you have. This is a clean copy of
24 the same document.

25 I have four extra copies of everything for

1 the various parties in the room. That's the same one I
2 handed up, but ours has a lot of notes on the front and
3 the back, so if we could substitute. These, your Honor,
4 are the two proposals that are before the Court right
5 now.

6 Now, ours is very similar to the Vioxx order
7 your Honor, if I may approach?

8 THE COURT: Yes.

9 MS. GREER: This is the fact sheet from the
10 Vioxx case. This is the one that Judge Fallon discusses
11 in his article that we've represented, both sides have
12 relied on to the Court, if you want a copy. We'll
13 distribute out copies to everyone later unless they want
14 them right now. I don't want to hold up the Court's
15 time.

16 All of these orders that I'm going to be
17 handing you, this is from the Alabama GE CAT scan
18 litigation where people were claimed to have been
19 over-radiated. This was what I used, frankly, as a
20 basis for coming up with the proposed fact sheet that we
21 supplied.

22 All of these, by the way, your Honor, have
23 releases attached to them. Some of them have more than
24 we've asked for, including one that I'm kind of kicking
25 myself on asking for psychoanalysis reports, so, I mean,

1 these have been approved by courts, agreed to by
2 parties, but these have been operative documents.
3 They're all publicly available. I can provide the
4 website.

5 This one is from the Denture Adhesives that
6 I'm going to be handing up. I'll just bring them all up
7 at one time if that's okay with you.

8 MR. STRANCH: Your Honor, I'd like to
9 correct one thing that's been said that we insisted that
10 there only be six plaintiffs that have full discovery.
11 That's not actually true.

12 THE COURT: Let me let Ms. Greer finish.

13 MS. GREER: This last one is the Paxil
14 litigation. These are all MDL state-coordinated
15 proceedings. All of these fact sheets ask for a lot of
16 the same information we're asking for. We asked for
17 comments to our fact sheet. We said if you think we're
18 asking for too many authorizations, too many questions,
19 and let me just back up and talk about what a fact sheet
20 is.

21 A fact sheet takes the place of
22 interrogatories, and at some point once we settle on a
23 form, we're going to need the Court to do an order that
24 says this is what you're going to use. This takes the
25 place of interrogatories and requests for productions,

1 and the reason that people have been using these forms,
2 that Judges have approved them is because they're easier
3 for plaintiffs to fill out. They look a lot like what
4 you fill out at the doctor's office.

5 THE COURT: You don't need to convince me
6 that some form of this is necessary.

7 MS. GREER: Okay.

8 THE COURT: If there's anything more useless
9 than interrogatories, I don't know what it is.

12:22PM 10 MS. GREER: Then let's talk about what the
11 plaintiffs' proposal is.

12 THE COURT: Requests for admissions are more
13 useless than interrogatories.

14 MS. GREER: I couldn't agree with you more.
15 I just served our responses. Their fact sheet does not
16 have any historical information in it, including prior
17 treaters. That's really, really critical in the
18 bellwether process. Every order you read, every article
19 on bellwether, this is what Judge Fallon has referred to
12:22PM 20 as the important basic information.

21 The reason I gave you his fact sheet and his
22 authorizations that were used in Vioxx because that's
23 what he considered important basic information. That is
24 a given before you move to the bellwether selection
25 process. It's not just limited to medical records.

1 By the way, they've had an issue medical
2 records only going back three years. The standard is
3 ten. That's what we've asked for. The standard in
4 every malpractice case, whether it's individual
5 plaintiffs, whether it's multiple, I mean, however it's
6 done, all of the authorizations, I've gone back, have
7 been 10 years, and that's what's in all of these orders
8 that we've given you. They also want to X out certain
9 things like HIV and psychoanalysis records, and, you
10 know, we can make accommodations for that.

12:23PM

11 In terms of HIV, we really can't. That's an
12 autoimmune that bears directly on multiple issues in the
13 case, everything from causation to, you know, life
14 expectancy, et cetera. These kinds of things play in,
15 and to have a true picture of these plaintiffs so that
16 we know that we are dealing with a truly representative
17 case and not what all the Federal Judges who were just
18 summarized in the ACI conference, they spoke on this
19 very issue of bellwethers, and they said their
20 frustration was that all the parties are trying to get
21 outliers tried as bellwether cases.

12:24PM

22 An outlier, you want to find somebody who
23 doesn't have "sexy facts," and that's the case you want
24 to be represented, but we won't know that until we have
25 this information, and I want to be clear. The

1 plaintiffs have this information. What they're trying
2 to prevent is us from having it, and there's another
3 piece of this that I don't think is fully before the
4 Court, and that is this issue of getting the medical
5 records at all because the plaintiffs' proposal is that
6 all the medical records would go to a registry, even
7 after the authorizations are signed, and they would have
8 first access to them and decide what would be produced
9 to us and what would not be. That's not the way it's
10 done. That's not the way it's not done.

12:24PM

11 Now, there have been various protocols that
12 have been developed, and, I apologize, I can't remember
13 which MDL, but it's one of the five that I've just given
14 you where they took an approach and said if the
15 physician or the treater is identified on your fact
16 sheet, we'll give a blank authorization, then you can go
17 serve them.

18 If you want to go get records from anybody
19 who's not on the fact sheet, you have to have an
20 objection, meet and confer process, then the Court will
21 eventually decide if it can't be resolved. That is how
22 it's usually done, and that's the way it should be done
23 here.

12:25PM

24 Also, if there's specific records that they
25 think shouldn't be in the mix, then we can deal with

1 that when the records are requested. There is a process
2 for that, but to put them in a registry where they get
3 to decide what we get and what we don't is getting back
4 to the one-sided process that I think the Court's trying
5 to avoid.

6 MS. PARKER: If I could respond to that?

7 THE COURT: Yes, Ms. Parker.

8 MS. PARKER: Thank you, your Honor. The
9 tragedy of this situation is that we are dealing with a
10 defendant who is in bankruptcy and a definitively
11 limited fund context. Efficiency here is of the
12 paramount importance.

13 The plaintiffs' steering committee struggles
14 with this, your Honor, on a daily basis trying to figure
15 out how we best represent the interests of plaintiffs
16 and provide information that defendants may be entitled
17 to at some point while keeping in mind efforts to keep
18 costs down.

19 In this situation, we have proposed using
20 the same form that plaintiffs already have to fill out
21 in the bankruptcy as a starting point, and only as a
22 starting point, but as a starting point that will allow
23 plaintiffs and defendants to sit down together and to
24 group cases into bellwether groupings that then will be
25 subject to additional discovery, and one of the reasons

1 we have done that, your Honor, is not just your ordinary
2 concern for efficiency sake but because it costs time
3 and money for plaintiffs and their lawyers to sit down
4 and to go through these forms and to fill out these
5 questions, so to the extent that we can avoid billing on
6 both sides, both by plaintiffs' lawyers and by defense
7 lawyers, that eat away theoretically at assets of the
8 estate or at the plaintiffs' recovery, we have
9 endeavored to do that.

12:27PM

10 The plaintiffs' steering committee could
11 give you just as many examples, your Honor, of five-page
12 plaintiff profile forms, but I think it suffices to say
13 that none of the forms that Ms. Greer has handed up to
14 you apply in the context where you had a different in
15 bankrupt and a limited fund.

12:27PM

16 Vioxx was not a case where they were worried
17 about there being enough money to go around. We also
18 could give you examples of instances where medical
19 records go back five years, not ten years. We've also
20 got three years and two years, so I think it's a little
21 bit of an overstatement to say that ten years is the
22 default.

23 On the medical records piece, I believe what
24 Ms. Greer is referring to is the plaintiffs' steering
25 committee has been upfront since the beginning of this

1 litigation that we intended to set up and have set up a
2 repository where plaintiffs' lawyers who have already
3 paid and incurred the costs for collecting medical
4 records could be able to upload those records to a
5 repository that could be accessed by the defendants if
6 they chose to use those records rather than go out and
7 incur additional costs of collecting records on their
8 own.

9 We never intended to suggest that the
10 defendants could not in fact go out and re-collect the
11 same set of medical records on their own. It was an
12 effort to share costs and to share information in this
13 very particular bankruptcy context.

14 Finally, on the HIV point, plaintiffs'
15 steering committee has asked since the first time the
16 HIV issue was raised for any sort of scientific
17 explanation for why HIV would matter here.

18 If there were a declaration from an expert,
19 for example, saying that someone with HIV was five times
20 more likely to contract fungal meningitis from a
21 contaminated dose of MPA, maybe the plaintiffs' steering
22 committee would reconsider our position, but until
23 someone explains to us why HIV records may be relevant
24 here from a scientific basis rather than speculation or
25 simply saying it's autoimmune, we're not comfortable

12:28PM

12:28PM

1 making that accommodation.

2 Also, if someone did have HIV, we would
3 suggest that that case would not be representative and
4 would not be a good bellwether selection.

5 MS. GREER: Which is why we need to know,
6 your Honor. It's why we need to know. I mean, it's
7 really important that we have access to the same
8 information that they do.

9 Now, the way the repository has been
10 presented to us is very different from what you just
11 heard. The way the repository was presented to us is
12 that it will be a channelling mechanism for all records
13 that we would seek.

14 We have access to the records of these
15 people being treated and these people being administered
16 the steroids. Those releases have already been
17 provided. What we need are records going back in time
18 so that we can truly figure out the health histories,
19 the co-morbidities, the kinds of confounding factors
20 that are going to be necessary to understand.

21 What they are suggesting to you as an
22 overall procedure is unprecedented, and they haven't
23 been able to show you anything to support it.

24 Now, they've mentioned the transvaginal
25 pelvic mesh litigation, which is in Western District of

1 Virginia right now. There are four major defendants
2 that are into bellwether phases, and we have both relied
3 upon those. They entered into a very different strategy
4 for the specific context of the case, but even there,
5 your Honor, if I may approach again, the profile sheet
6 that was used was much more detailed and had health
7 histories in it and physicians going back in time for
8 treating for other conditions, and, really critically,
9 they had full access to all records on all plaintiffs.

12:30PM

10 That was a very different proposal from what
11 you're hearing today. The records are that important.
12 Now, the reason that they agreed to this abbreviated
13 profile form in the mesh litigation, from what I
14 understand, is that they had so many cases.

15 At that point I think they had 8,000, very
16 different from our situation. Right now, as a practical
17 matter, what you're dealing with are a little more than
18 100 cases because we're the only ones here talking
19 because we're the only ones affected by these orders,
20 and we represent about 100 cases, so that's the universe
21 at this time, not 8,000, and so to streamline the
22 process, they agreed to do this.

12:31PM

23 Another very, very significant difference
24 was that the "discovery pool" or the "bellwether pool"
25 that you were choosing from where they had full access

1 to everything, including depositions, the treaters, the
2 individuals, everybody involved, that was more like 20
3 or 30 per stage, and they're approaching six, so it's a
4 one-sided fight here. We're not going to be able to
5 have representative information that we can really
6 understand these claims, and that's the whole game.

7 THE COURT: All right. Let me cut this
8 short. I'm not going to decide this on the fly as I sit
9 here. There are lots of different parts of this and
10 lots of questions not only are you entitled to the
11 information at all but at what stage and so on.

12:32PM

12 What I'm going to do is think about this.
13 I'm going to set up a process for developing a uniform
14 fact sheet. It might be a one-stage process, it might
15 be two-stage, I don't know.

16 I'm very likely, although I haven't told her
17 yet, that I'm going to involve the magistrate judge in
18 this because I don't think this is something that is
19 going to lend itself to lawyer-to-lawyer negotiation,
20 there being so many parts. I think it's going to have
21 to be guided or structured somehow.

12:32PM

22 I want to think through that process, but
23 for better or worse, I want to resolve it one way or the
24 other. I suspect that the bankruptcy form is on the
25 light side, but I'll see. I want to think about it, and

1 we may not need every piece of information at this
2 stage, but what I need to do, again, is put a process in
3 place for getting this resolved so we can get going on
4 it, and that's where I'm going to leave it now.

5 I am convinced that the fact sheet is the
6 way to go, that it should supersede, at least at this
7 stage, pending further order any interrogatories,
8 document production or requests for admissions and
9 served by any defendants and any plaintiffs. I don't
10 see the point. Plaintiffs' depositions are going to be
11 put on hold for the time being.

12:33PM

12 Let's leave it that way for now, and I will
13 issue an order, and we'll take it from there, and I
14 strongly suspect that the poor magistrate judge is going
15 to be in the middle of this fight.

16 MS. DOUGHERTY: Your Honor, since the
17 plaintiffs' steering committee's filing on this matter,
18 we've made additional compromises related to the
19 negotiations that we were having, and those were not
20 represented here in court today. The compromises were
21 sent by a letter this morning, so, granted, Ms. Greer
22 has not probably had the opportunity to take a look at
23 that.

12:34PM

24 Would it be useful if we filed just a short
25 supplemental briefing that sets forth the additional

1 compromises that we've made?

2 THE COURT: That's fine.

3 MS. GREER: Would we have an opportunity to
4 respond, your Honor?

5 THE COURT: Yes.

6 MS. DOUGHERTY: Thank you.

7 THE COURT: I mean, I think as a practical
8 matter, not much real headway is going to be made until
9 after the first of the year, given everything else we
10 have to do, but I would like to tee this up for
11 resolution relatively promptly. Thank you, Ms. Greer.

12:34PM

12 Anything else on discovery from plaintiffs?

13 (No response)

14 THE COURT: Okay. In terms of discovery
15 from defendants, what do we have to talk about there?
16 Who wants to take the lead?

17 MR. STRANCH: Your Honor, this is
18 Gerard Stranch on behalf of the plaintiffs' steering
19 committee.

12:35PM

20 THE COURT: Yes.

21 MR. STRANCH: Cognizant of the Court's
22 request over the summer and then the Court's orders in
23 September telling us to start discovery and get this
24 case moving, we served master discovery on multiple
25 defendants, particularly in Tennessee, and where that

1 stands right now is the magistrate judge has ordered
2 that the subpoenas be responded to as of today.

3 Our discovery responses were due, the
4 magistrate judge's order said you don't have to
5 duplicate, so if you're ordered to give something in the
6 subpoena, you don't have to regive it in your regular
7 discovery if you're in.

8 Well, where we are now, we've yet to receive
9 a single page of documents in this case. We've yet to
10 receive -- we did receive some limited interrogatory
11 responses from one of the Tennessee defendants or a
12 group of the Tennessee defendants yesterday, but there's
13 motions to stay down, and the reasons for the motion to
14 stay is there's this desire by the defendants to create
15 discovery protocol orders, ESI. They've requested that
16 we do Rule 26(f) conferences for every single defendant
17 to set up how that discovery is going to go.

18 Our position has been we're happy to talk
19 about a discovery protocol that would, you know, place
20 limitations on depositions and how depositions go
21 forward and where they go forward, ESI protocols. In
22 light of that, we've provided an ESI protocol to the
23 defendants, we've provided a deposition protocol to the
24 defendants, but our position all along has been
25 consistent with what the Court said, discovery is open,

1 go do discovery.

2 We've even suggested to the defendants
3 because some of the Tennessee defense were sued in state
4 court earlier and produced some documents in state court
5 and did some limited discovery, that the first tranche
6 of discovery here could be just reproducing that in the
7 Federal Court so that we would have it given to us in
8 our case.

9 So far that's not occurred, your Honor, so
12:37PM 10 we're at the position where we need some help from the
11 Court to get discovery moving so that we can be prepared
12 to move these cases through to trial as quickly as
13 possible.

14 THE COURT: Well, let me -- Ms. Greer was
15 about to stand up. I want to hear from her, but there
16 are -- I'm not sure that we can truly avoid 26(f)
17 conferences, at least, I mean, we have defendants who
18 are individual physicians, and we have defendants who
19 are multi-national corporations, and there are a lot of
12:37PM 20 different types of defendants here, and they may be in
21 very different positions, and it has to be sensible and
22 tailored as makes sense under the circumstances.

23 Ms. Greer.

24 MS. GREER: I'm happy to address it whenever
25 you're ready.

1 THE COURT: Why don't you do so now.

2 MS. GREER: Well, first, you know, we
3 received master discovery, and we responded to master
4 discovery. We've told the plaintiffs' steering
5 committee that we will produce the documents from,
6 Tennessee but we do have a dispute over the protective
7 order, which we can take up when you're ready for that.

8 We were not involved in that decision, and
9 we feel that there are changes that need to be made, and
10 12:38PM once the Court rules on that request, we will produce
11 the paper copies.

12 The electronic discovery was a completely
13 different matter because, you know, certainly we have
14 been collecting it, we have been going forward, we
15 haven't been dragging our feet, but going through the
16 production process, as the Court probably has heard
17 rumors about, is an extremely expensive and
18 time-consuming proposition, and we don't want to start
19 that process until we have a shared understanding of
20 12:39PM what it is that we're going to be doing.

21 ESI protocols have become very common in
22 complex litigation of all kinds. It's not unusual to
23 negotiate one. They sent us one November 22d right
24 before the Thanksgiving holiday, and then I was out of
25 town on a planned vacation, and so we have comments that

1 we're going to be sending back, but until those issues
2 are addressed or resolved, or we may have to take it to
3 either your Honor or Judge Boal and have a resolution
4 there, but it doesn't make sense to put defendants
5 through the expense, and, by the way, this is another
6 one-sided deal because they're not going to have the
7 volumes of electronic discovery that we have to deal
8 with.

12:39PM 9 THE COURT: Virtually every product
10 liability case is lopsided, and that's just kind of the
11 way it is.

12 MS. GREER: It is, but that's why it's so
13 important that we get this protocol in place.

14 THE COURT: It makes no sense at all to just
15 go half-cocked into electronic discovery. It has to be
16 thoughtful and negotiated because otherwise it's going
17 to be a nightmare. It's a nightmare even when it's
18 that.

19 MS. GREER: Right.

12:40PM 20 THE COURT: But it needs to be developed in
21 some sensible way, search terms and, you know, all the
22 rest of it.

23 MS. GREER: Well, and what they said is they
24 expected a rolling production of electronic discovery to
25 start immediately, and we're not in a position to do

1 that until we have, Number 1, the protective order issue
2 resolved; and, Number 2, some sort of understanding of
3 how this is going to work because the last thing we want
4 to be doing is trying to do fix it on the back end.

5 I just recently went through that in another
6 case, and we did not enter into an ESI protocol, much to
7 everyone's chagrin, and it turned out the other side had
8 not done what they were supposed to do, and we had to do
9 post-discovery cutoffs, discovery to the tune of 40,000
10 documents that should have been produced, so that's what
11 I'd like to avoid here so that we do it once and we do
12 it right. That was not our issue, it was the other
13 side's, but that is certainly possible when people take
14 different views and the operative terms and the rules of
15 engagement aren't set out in advance.

16 We are not asking for a separate Rule 26
17 order or report to be entered in every single case for
18 every single defendant. I think there are ways that we
19 can come together. Their position has been, well, we
20 don't have to do it because the Judge has already
21 ordered discovery. Again, we're being discovered
22 against but we are not getting access to any of their
23 discovery. It's very one-sided.

24 We feel that there ought to be some rules of
25 engagement regarding just the discovery process and how

1 it's going to occur. We are working on a deposition
2 protocol. They sent us that the day before
3 Thanksgiving. We've got comments that will be going
4 back. We're working on, you know, different pieces of
5 it, but there ought to be kind of an overall plan. I've
6 seen it done in all these different MDLs, and I think it
7 helps kind of have a shared understanding.

8 MR. STRANCH: Your Honor, if I may, in CMO-6
9 this Court ordered the defendants to produce any
10 discovery produced in state court to lead plaintiffs, to
11 the plaintiffs' steering committee, to the lead counsel.
12 The production was to be in native format unless we
13 otherwise agreed between the parties. That's not
14 happened yet.

15 That is many months old. You know, I hear
16 the discussion about meeting ESI in deposition
17 protocols. We have proposed those. Those have been
18 proposed since November 22nd, and we've not gotten back
19 one comment yet.

12:41PM 20 In fact, we were told there would be none
21 and they'd be filing a motion to stay if we didn't agree
22 to certain changes that they wanted in a protective
23 order that would waive substantive rights that our
24 clients have to have their doctors not speak with
25 defense counsel without someone being present there or

12:42PM

1 prior knowledge of it.

2 You know, your Honor, we're trying to move
3 this. We want it to be orderly, but we keep putting it
4 off, and there's nothing happening, so we need it to
5 move. If the Court wants to put a deadline to get that
6 ESI protocol and that ESI deposition protocol completed,
7 we are very happy to have that done.

8 We have said on the electronic discovery
9 they don't need to do it until we get this worked out,
10 but we've got to get comments back so we can get it
11 worked out.

12 MS. GREER: We agree, your Honor, but to be
13 fair, we have been negotiating for many, many weeks. We
14 got out a bunch of protocols, and the Court's got it
15 detailed in my declaration ad nauseam all the different
16 things that we've sent over and shared with them. The
17 first written document we got from them was
18 November 22d, so we're just now responding to this.

19 THE COURT: This is another issue I'm not
20 going to resolve as I sit here. This has to be worked
21 out one way or another in terms of the modification of
22 the protective order. You filed a motion, right,
23 St. Thomas did?

24 MS. GREER: We did, your Honor.

25 THE COURT: And I think what I am highly

1 likely to do here is to issue an order that sets some
2 deadlines, refers it to the magistrate judge or both,
3 but, again, the time to sort these issues out is now.

4 There may not be perfect congruence in terms
5 of discovery against defendants proceeding in perfect
6 synchronization with discovery against plaintiffs, just
7 given the way this has played out, and that's just the
8 way it is, and in all likelihood, obviously, the
9 defendants are going to have a lot more work to do than
10 plaintiffs in terms of producing documents, and that's,
11 again, kind of the way it is, but these are solvable
12 issues. It's just a matter of working through them,
13 setting deadlines, making decisions and so forth, and I
14 think in all likelihood poor Magistrate Judge Boal has
15 to get involved.

12:44PM

16 MS. GREER: Are you going to tell her before
17 or after the holidays?

18 THE COURT: I may not just return her phone
19 calls, I may issue an order and avoid her. For the
20 record, that was a joke.

12:44PM

21 [Laughter]

22 MR. STRANCH: The magistrate judge certainly
23 hopes so.

24 THE COURT: These are solvable problems.
25 Again, it's just a matter of working at it and

1 negotiating that which can be negotiated, resolving the
2 disputes that remain, and what I want to do is get it on
3 track and get it going, and, again, as a practical
4 matter, that will likely not occur until after the first
5 of the year, but I want to get started on it.

6 Anything else on discovery from defendants?

7 Again, I'm using Ms. Greer as the de facto
8 representative of I guess unaffiliated defendants here,
9 for want of a different representative. Does anyone
10 else want to be heard on this topic?

12:45PM

11 MR. TARDIO: Your Honor, this is
12 Chris Tardio in Nashville. I represent St. Thomas
13 Outpatient Neurosurgical Clinic and other Tennessee
14 defendants, which, as your Honor knows, is a separate
15 defendant with a similar name to Ms. Greer's client.

16 I want to make sure that I understand our
17 obligations under the Court's direction a moment ago.
18 There is outstanding discovery to us. As your Honor
19 knows, from the papers we filed, our position has been
20 that some plan needs to be put in place before we are
21 required to respond to that written discovery.

12:46PM

22 My understanding the Court's direction to us
23 that in essence we don't need to respond to the written
24 discovery that's out there until a plan is put in place
25 or until Magistrate Judge Boal rules on a plan, enters a

1 plan or enters some deadlines?

2 THE COURT: Well, I'm not sure I can answer
3 that question in the abstract. My intent is that I
4 don't want anyone to be put to unnecessary work or to go
5 off half-cocked until some of these issues are resolved
6 since I don't know precisely what discovery requests
7 have been made, what the status of it is. I'm not sure
8 I can grant a blanket immunity here, but my general
9 sense and intention is that there are some issues that
10 it appears to me likely that need to be worked out with
11 at least some defendants, perhaps your client being one
12 of them.

12:47PM

13 I think you joined in what Ms. Greer is
14 going to do, but those issues are going to have to be
15 resolved in a thoughtful manner, and I'm not sure at
16 this point I see the point of either plaintiffs filing a
17 motion to compel or you filing a motion for protective
18 order while we sort these out, but I'm not going to make
19 a blanket ruling either since I just don't know what the
20 individual requests are, what we're talking about.

12:47PM

21 MR. STRANCH: Your Honor, if I could make a
22 suggestion on how to do this that I think will set in
23 course the process that you've alluded to. Magistrate
24 Judge Boal has already ordered that subpoenas be
25 responded to, and she's limited what those are. We

1 think that those should go ahead and go forward and the
2 defendants who receive those should go ahead and produce
3 responses to those pursuant to her previous order.

4 We think that pursuant to Court CMO-6
5 anything you've turned over in state court litigation,
6 you need to turn over to the lead counsel for the PSC so
7 they have those same documents in discovery, should go
8 ahead and go forward now, and then we believe there
9 should be answers and objections to the written
10 discovery that we've put out so far so that we can begin
11 the process of meeting and conferring and working
12 through that because I suspect there's going to be
13 meeting and conferring over time periods, over, you
14 know, whether you get certain documents, and so we
15 should start that process now instead of kicking that
16 process on into January or February.

17 Now, for the ESI protocols, the deposition
18 protocols, those you're going to understand the Court's
19 going to give to the magistrate judge to deal with, and
20 we can put off the electronic document searches until
21 that is entered with the magistrate, but in terms of the
22 getting to the meat of what discovery people are going
23 to be able to agree, what's relevant, what's not
24 relevant, what's burdensome, what's not burdensome, we
25 should start that meeting and conferring process now,

1 your Honor, and for the other two categories of
2 documents, those have already been vetted and should go
3 ahead and be turned over post-haste.

4 THE COURT: Mr. Fennell, did you want to say
5 something?

6 MR. FENNELL: I was just going to, I guess,
7 second that a little bit. Judge Boal's order was
8 effective -- I mean, the 30-day deadline is today for
9 her order, and as far as I know, nobody's appealed it.

12:49PM

10 People have announced, certain healthcare providers have
11 announced their position or their interpretation of her
12 order as applies to each of them, and we're going to
13 deal with that, but I would hope that today would be the
14 deadline for all of the clinics to respond to it, and I
15 would hope that the Court today wouldn't affect --
16 anything this Court does today in terms of rulings
17 wouldn't affect that deadline.

18 THE COURT: Well, this may be a
19 Nashville-only dispute, I don't know. Ms. Greer.

12:50PM

20 MS. GREER: Judge, I have a quick
21 clarification. On the CMO-6 issue which was entered
22 before we were in the case, we will produce those
23 documents once the Court resolves the protective order
24 issues. Those are not tied to ESI protocol or
25 depositions, but we can't produce them until we have

1 that resolution.

2 MR. STRANCH: Your Honor, there's a
3 protective order in place that provides coverage.

4 THE COURT: Well, they're asking me to
5 modify it, and I at least have to consider that.

6 All right. I'm going to take all of that
7 under advisement, and I am anxious to get things going
8 and will do my best to kickstart that.

9 Let me ask before my stenographer's fingers
10 fall off here, how much longer do you think we have to
11 go? Should we take a break?

12 MR. STRANCH: Does your Honor intend to take
13 up the protective order arguments today, or are you
14 going take that under submission?

15 THE COURT: I'm going to take that under
16 submission.

17 MR. GASTEL: Your Honor --

18 THE COURT: Yes.

19 MR. GASTEL: -- this is Ben Gastel in
12:51PM 20 Nashville with Branstetter, Stranch & Jennings.
21 Ms. Greer can correct me if I'm wrong on this, but I
22 believe that the documents that they produced in state
23 court litigation they produced in the absence of a
24 protective order, so I'm not entirely sure why they are
25 now taking the position that they need a protective

1 order before they produce those in Federal Court.

2 THE COURT: All right. Again, I'm going to
3 take all that under advisement, and we'll take it as it
4 comes. Let's do this. Why don't we take a break of 5,
5 1, 2, 3, 4, 5 minutes, I will leave the phone lines
6 open, and that will give everyone a chance to use the
7 facilities, and we'll be back in five minutes.

8 (A recess was taken.)

9 THE COURT: I see empty chairs. Are we
10 ready to go?

11 MS. PARKER: Yes, your Honor.

12 THE COURT: Let me take up one more thing as
13 long as I'm off the agenda and onto my own agenda, and
14 that is the question of selection of bellwether cases.

15 Following plaintiffs' lead, I had some set
16 deadlines in MDL Number 7. I think they clearly need to
17 be vacated. I'm not prepared to set new deadlines at
18 this point. I'm not sure quite what a bellwether case
19 is going to look like. I want that framework to be in
20 place relatively quickly, but I think at this point,
21 that process needs to be put on hold pending some of
22 these other developments, and we can continue to talk
23 about it, but just so that it's clear, those MDL
24 deadlines, that is, in MDL Number 7 for completion of
25 plaintiff profiles and selection of bellwether cases,

1 are vacated and we will take it up at a later time.

2 What else do we have to talk about? By the
3 way, on these St. Thomas, the various motions that are
4 pending, I'm going to try to sort through and figure out
5 what I'm granting, what I'm denying and what I'm doing
6 with it. I know some of you were trying to get out
7 because it's Friday afternoon. I have a major and
8 lengthy hearing at 2:30, and I'd like to gobble down a
9 sandwich before that, if I can, but so I will sort that
10 out by electronic order after the hearing.

12:59PM

11 MS. PARKER: I believe there are two points,
12 your Honor. I think they're both quick ones. The first
13 would be ARL's motion for extension of time to file a
14 proof of claim.

15 THE COURT: Yes.

16 MS. PARKER: The second would be access to
17 informal discovery produced by NECC. I think we can
18 dispense with each of those quickly.

19 THE COURT: Okay.

12:59PM

20 MS. PARKER: I'll note there's a typo on the
21 agenda, it refers to ARL BioPharma's motion for
22 extension as assented to.

23 THE COURT: It is not.

24 MS. PARKER: It is not assented to, and that
25 is the wrong docket number. The docket number that it

1 should have referred to is 570, and I'll let the trustee
2 address that.

3 THE COURT: All right. Mr. Gottfried.

4 MR. GOTTFRIED: Thank you, your Honor.

5 First, before we get into I guess the merits of it, if
6 in fact what ARL is seeking is an extension of time to
7 file on or before January 15th. Given the pace of the
8 mediation with ARL, the trustee would have no objection
9 to that provided that they affirm to the Court that they
10 will file the proof of claim on or about January 15th
11 and not seek any further extensions. So if that's
12 acceptable, then I think the motion would be resolved.

01:00PM

13 As we indicated in our papers, we believe
14 it's extremely important that the proof of claim be
15 filed, which would absolutely confirm under your
16 transfer order the subject matter jurisdiction of the
17 Court with respect to ARL and these matters.

18 We also believe that it's critical that we
19 have the proof of claim, believe it can be filed,
20 believe it can be estimated, certainly can be amended
21 after the fact and is done all the time, so and with the
22 extension that we're prepared to agree to, they would
23 have plenty of time to prepare that, but, most
24 importantly, I would say that as this motion itself
25 indicates, it's only seeking extension until

01:01PM

1 January 15th, and our concern is that the real agenda is
2 not more time, which we've repeatedly given multiple
3 times, as a courtesy, but rather not to file at all
4 until they see whether they reach a settlement, and
5 that's something that the trustee strongly objects to
6 for many reasons.

7 Just to highlight one or two, to be brief,
8 there are many benefits participating in the mediation
9 process, including Number 1, the opportunity to resolve
01:02PM 10 these cases expeditiously and inexpensively. If we
11 proceed with the schedule we talked about with the
12 mediator, they would be getting meaningful, informal
13 discovery, they're getting the time and attention of
14 multiple decision-makers from the PSC, the trustee, the
15 creditors' committee, and this is the protocol that was
16 agreed to.

17 They are important reasons, and particularly
18 with respect to jurisdiction why it's important, and if
19 they want the benefits of this process, we believe they
01:02PM 20 should be more than willing to file a proof of claim, as
21 they themselves concede they would need to do if a
22 settlement is reached and they wanted to take advantage
23 of what we hope will be a successful bankruptcy plan.

24 THE COURT: Who wants to -- yes.

25 MS. RAGOSTA: Thank you, your Honor.

1 Kristen Ragosta, R-a-g-o-s-t-a. Your Honor, it is true
2 at this time we are seeking to extend the time to file a
3 proof of claim until January 15th. Ultimately, though,
4 we are considering what your order actually meant, and
5 if ARL decided that it didn't have a claim that it
6 intends to assert at all or if it has only a meaningless
7 or unallowable claim, that's still a prerequisite to
8 mediation.

01:03PM 9 THE COURT: I guess I don't know the answer
10 to that. I hadn't thought about that.

11 MS. RAGOSTA: And, your Honor, ARL feels
12 very strongly about this because their position -- there
13 are several issues I want to discuss with you, but first
14 and foremost, they believe if they're compelled to file
15 a proof of claim in the bankruptcy court, then that will
16 impede on their constitutional right to a jury trial and
17 to have an ARL III Judge decide some of the issues in
18 this case.

19 ARL understands that it needs --

01:03PM 20 THE COURT: I'm not sure I understand why.
21 Normally jury issues, the reference is withdrawn, and we
22 resolve them like any other case.

23 MS. RAGOSTA: Your Honor, the case law that
24 we are reading states that if you file a proof of claim,
25 that you've waived your right to a jury trial, so even

1 though if you had a right to a jury trial, you would be
2 able to have that heard by an ARL III Judge.

3 We believe that once you waive that right,
4 then you lose it, especially once we file a proof of
5 claim, we believe that the trustee can then assert a
6 counterclaim, and a counterclaim filed by the trustee
7 would then be potentially considered a court proceeding,
8 and once it's a court proceeding, we believe then we
9 have trouble having that case removed or having the
01:04PM 10 trial removed if we have trial rights at all.

11 THE COURT: Well, I'm no bankruptcy maven,
12 but I don't think that's the way it works. Anyhow, I'm
13 not going to make that decision now. Go ahead.

14 MS. RAGOSTA: Thank you, your Honor. ARL
15 understands that it needs to consent to the jurisdiction
16 of the bankruptcy court in order to enjoy the benefits
17 of the mediation. ARL does not need to file an
18 additional proof of claim to do that, ARL can merely
19 consent to the bankruptcy court jurisdiction upon a
01:05PM 20 successful mediation without then waiving what it
21 believes are its important constitutional rights, and,
22 moreover, ARL believes it's already deemed to have filed
23 a proof of claim because it's listed on the schedule
24 that NECC filed listing the claimants.

25 It already has an uncontested, unliquidated,

1 undisputed claim on the record, and so it's already in
2 the bankruptcy court for the purposes of participating
3 in the plan and having jurisdiction.

4 We believe that that's reflected in
5 Judge Boroff's order on the bar date, which states that
6 if someone's already listed on those schedules, they
7 don't have to file a proof of claim, and so there's an
8 inconsistency with the order in this Court that says
9 there has to be a proof of claim filed where

01:05PM

10 Judge Boroff's order suggests that it does not.

11 Your Honor, ARL is also uncomfortable filing
12 a proof of claim under oath when they believe it
13 potentially could be meaningless and it's not allowable
14 in the bankruptcy court. They believe both of these
15 things because it would be a contingent claim. The
16 claim is meaningless because it's contingent on claims
17 that are asserted by the plaintiffs which haven't been
18 finalized yet.

01:06PM

19 They won't be tabulated and provided to ARL
20 for at least 30 days after the bar date, potentially
21 longer, and, your Honor, the point of a proof of claim
22 is so that the claimant can obtain money from the
23 estate.

24 In this case, there is no reasonable
25 expectation that ARL will ever obtain any money from the

1 estate, and they believe potentially if they filed a
2 claim, it won't be allowable because it will never
3 become allowable until they pay money, it will always be
4 for contribution or contingent.

5 It's particularly at the time that the Court
6 or the trustee decides whether to allow it or not, and
7 so their difficulty is trying to file a claim under oath
8 that they know won't be allowable, and they believe that
9 pursuant to Chapter 11, Section 502(e)(1)(b).

01:07PM

10 I know that the trustee has cited in his
11 brief *Hemingway v. Transport* against that proposition,
12 and I don't think that that case applies here. In that
13 case, the claim was called contingent, but I believe the
14 Court determined that it may have been improperly called
15 contingent in that he remanded it back to determine
16 whether it was actually an administrative expense or if
17 it was an actual contingent claim in a joint and several
18 liability case, and they determined that if it was a
19 situation where there was joint and several tort

01:07PM

20 liability, that claim would be still unallowable if it
21 was contingent, so I think that that case doesn't apply
22 here.

23 So, your Honor, because the claim may be
24 baseless, unallowable, and we're already potentially
25 part of the plan, and we can consent to the plan at any

1 time, the only impact that ARL sees it will have is it
2 will potentially waive jury trial rights, allow the
3 estate to file cross-claims against ARL giving them an
4 unfair advantage, and I do have the case law that
5 they're citing to and the statutes, which I can either
6 read to you now or send to you in a supplemental brief.

7 The creditors have relied on
8 *Stern v. Marshall* during our discussions, and I would
9 suggest that that case doesn't apply either. In that
01:08PM 10 case, the claim asserted against the estate was for
11 defamation.

12 The estate countered with a claim for
13 intentional interference with a gift, and the Court
14 found that those two claims weren't sufficiently related
15 to call the counterclaim of Court proceeding so that
16 they determined that they weren't going to here the
17 counterclaim under the bankruptcy court jurisdiction,
18 but in this case, I suggest that the Court could come to
19 a different conclusion because it basically would be the
01:08PM 20 same operative facts that the Court was trying to
21 decide, and the only question would be is ARL liable or
22 NECC, and it wouldn't be different dates and different
23 issues, it would all be the same core issue, and that's
24 their concern.

25 Your Honor, just to hit some of the points

1 in the trustee's brief, ARL has objected to this
2 provision from the outset. We were working with the
3 PSC, and they did grant extensions. We continue to work
4 it out, but we have never agreed to this provision.

5 We understand that there's a benefit to
6 being in the mediation process. That's a benefit that
7 both parties are receiving. ARL is a small company with
8 a small insurance policy that's eroding, and the more
9 money that we save is the more money that we have for
01:09PM 10 mediation for the plaintiffs and the parties in this
11 case. I think the mediation generally is beneficial to
12 both sides, and it's not just one-sided on our part.

13 The trustee is also saying we need to file a
14 proof of claim to ensure that we're going to participate
15 in the mediation, and I'd suggest we've already filed a
16 certification to this Court that we're going to
17 participate.

18 You ordered us to participate in good faith.
19 We've produced tens of thousands of documents already,
01:10PM 20 so the discovery stay is questionably helpful. They're
21 already asking us to produce thousands of more
22 documents. We haven't received any documents in return.
23 The trustee hasn't even agreed whether or not he will
24 participate in the mediation in person, so I think we've
25 shown that we are going to participate in good faith,

1 and if anyone's questioning who's going to participate
2 in good faith, it would be a question of the trustee.

3 So, your Honor, for all those reasons, we'd
4 just ask at first that you extend our time to file the
5 proof of claim until the bar date but that you not make
6 this proof of claim issue a contingency for mediation
7 and allow ARL to decide on its own whether it wants to
8 consider this the case law and make its own
9 determination.

01:10PM 10 THE COURT: All right. Mr. Gottfried.

11 MR. GOTTFRIED: I think our response is
12 simple and straightforward. The mediation order was
13 clear. If you want to participate in the mediation
14 process that the Court outlined and approved within 10
15 days of the filing that you're going to participate,
16 this was a requirement. I've explained the reasons for
17 that.

18 If they don't want to participate, it's a
19 voluntary process, that's fine. We prefer they do. We
01:11PM 20 prefer they filed a proof of claim. We don't view it as
21 a significant burden at all. We don't agree with their
22 analysis as to what would happen to them and befall them
23 if in fact the proof of claim was filed.

24 THE COURT: What's your view of the jury
25 trial issue?

1 MR. GOTTFRIED: I think the Court has
2 already withdrawn the reference on two cases that were
3 filed in the bankruptcy court to this court, and they're
4 here already, ARL, and I think on the personal injury
5 claims, that's what would happen.

6 So I'm not sure I candidly understand their
7 argument or why they think *Stern v. Marshall* doesn't
8 apply, but that's -- if they want to participate in this
9 Court-sanctioned process and get the benefit. I mean,
01:11PM 10 we don't have a single document from them. The trustees
11 have no documents from them. We've received no
12 discovery.

13 In the mediation call that we had with the
14 mediator, we certainly indicated that we would be happy
15 to have the PSC make the voluminous, informal discovery
16 that we have been producing all along available to ARL
17 as part of this process.

18 They've asked for information regarding
19 proof of claims. Under Judge Boroff's order, the only
01:12PM 20 way they can get that is if they are "a participating
21 party in a Court-sanctioned mediation," and then they
22 have to move for leave to get the claim forms.

23 So all this assumes that the bankruptcy
24 court's jurisdiction is confirmed under the transfer
25 order by filing a proof of claim and so we think it's an

1 important jurisdictional step that makes the mediation
2 meaningful.

3 MR. ELLIS: Your Honor, the PSC agrees with
4 the trustee, and, frankly, I've been dealing with this
5 issue for three months, and I still don't understand
6 what ARL's concern is, but if it comes down to it, you
7 know, we think they can withdraw from the mediation if
8 they don't want to file a proof of claim, but it has to
9 be their decision, but we think it should be a
10 requirement.

01:13PM

11 THE COURT: Ms. Ragosta, any response?

12 MS. RAGOSTA: Your Honor, I think the only
13 result, and that would be a tragedy, because our firm
14 would make a lot of money doing discovery for the next
15 three years, and the money would just start depleting
16 and not go -- and I don't think the mediation should be
17 predicated on this issue that's contested, and it's
18 unnecessary.

01:13PM

19 THE COURT: Mr. Gottfried, what would happen
20 if I simply granted the extension? If nothing else, I'm
21 kicking the can down the road. Does that make sense?
22 In other words, has the deadline passed?

23 MR. GOTTFRIED: I think technically the
24 deadline has passed from your last extension.

25 THE COURT: Was it December -- well,

1 whatever.

2 MR. GOTTFRIED: I think technically it's
3 passed. Obviously, as I said, we've be happy to extend
4 to January. I think the issue in terms of kicking the
5 can down the road is we are not inclined to continue to
6 work with the mediator if we don't have a
7 Court-sanctioned mediation process, so from our
8 perspective, our position is if you put everything on
9 hold until they either file or don't file, I guess
01:14PM 10 that's our view.

11 Again, I mean, I'm not trying to cast any
12 aspersions on anyone. I mean, from the trustee's
13 perspective, we were told, well, we were not quite sure
14 how to do this, we'll give you more time, we'll give you
15 more time.

16 Even this motion, in my view, is
17 disingenuous because it says we want an extension till
18 the 15th when the real answer is they don't want an
19 extension to the 15th, they want an option to see how
01:14PM 20 the mediation goes, and I think from our perspective,
21 they should be forced, if they want it, get the benefits
22 of the mediation process to fish or cut bait on that
23 point.

24 If this is such a significant issue that
25 they would rather not mediate under the Court-ordered

1 process, then fine, let's slow it down. If it isn't,
2 then let's go forward. We've certainly had I think
3 almost a two-hour call that I participated in with the
4 mediator to try to get this mediation going promptly,
5 and I think certainly we'd love to participate in it,
6 but we think this is an important jurisdictional piece,
7 and, you know, we stand on our opposition.

8 THE COURT: All right. What I'm going to do
9 is this. I'm going to grant it in part, I'm going to
01:15PM 10 grant the extension to December 23d, which is 10 days
11 and let the chips fall where they may.

12 MR. GOTTFRIED: Thank you, your Honor.

13 MS. RAGOSTA: Thank you, your Honor.

14 THE COURT: That's I think Number 570,
15 granted in part and denied in part.

16 Ms. Parker.

17 MS. PARKER: I think that brings us to
18 NECC's informal discovery. I'll suggest if it's all
19 right with Mr. Fern that we forego the usual report of
01:15PM 20 what has been done in the last month. There has been
21 discovery produced.

22 THE COURT: All right.

23 MS. PARKER: As the Court knows, NECC has
24 informally produced some discovery to the plaintiffs'
25 steering committee. The agreement between the

1 plaintiffs' steering committee and NECC precludes the
2 PSC from sharing that informally-produced discovery. I
3 want to bring one thing to the Court's attention on
4 that. The PSC has received a subpoena from InSight, I'm
5 sorry, it's not InSight Health.

6 MR. FENNELL: InSight Health Corp.

7 MS. PARKER: Thank you, InSight Health
8 Corp., which is a Virginia pain clinic trying to gain
9 access to the materials in the PSC's possession that
01:16PM 10 have been informally produced by NECC. The plaintiffs'
11 steering committee has responded informally but in
12 writing to InSight to let them know our position on that
13 matter.

14 We are considering our options on how to
15 respond. We raise it with the Court because it is
16 conceivable that we may wind up asking the Court for
17 assistance in resolving that matter.

18 THE COURT: All right. Again, just, again,
19 to state what may be obvious, at some point this
01:17PM 20 discovery needs to be made available. The only question
21 is doing this in a way that's reasonably controlled,
22 organized, fair to everyone and keeps costs down
23 and -- well, I would like to get to that point.

24 At some point, everyone is going to have to
25 be able to see these records, let's put it that way.

1 MS. PARKER: I'm sorry, I'm being reminded,
2 your Honor, that I sent a letter to all of the
3 unaffiliated defendants in this case identifying this
4 issue and suggesting that we meet and confer about how
5 best to resolve the issue. The PSC has no interest in
6 indefinitely keeping this information, but we are very
7 cognizant of the terms of our sharing agreement with
8 Mr. Gottfried and Mr. Moore.

01:17PM 9 THE COURT: All right. Let's leave that for
10 the time being where it is. Why don't we take two
11 minutes, status of bankruptcy proceedings, anything I
12 ought to know?

13 MR. GOTTFRIED: I think I gave you earlier
14 in the hearing what I think is the most important
15 developments, your Honor.

16 THE COURT: All right. Status of appeal
17 appeals?

01:18PM 18 MS. PARKER: The only recent activity is
19 that the creditors' committee moved to intervene in the
20 appeal, and that motion to intervene was granted.

21 THE COURT: All right. Anything else that
22 needs to be taken up now other than I'm going to have to
23 move the date of the February status conference because
24 of a change in my schedule, but otherwise is there
25 anything else anyone wants to take up? Ms. Greer.

1 MS. GREER: Your Honor, I have one very
2 small technical issue that I think will be easy,
3 hopefully will be easy. On CMO-Number 7, the Court had
4 an answer deadline for all of the 100 plus lawsuits that
5 were filed individually, and we got an extension while
6 we were kind of working through this process to answer
7 those.

8 I'm assuming that the Court would take that
9 deadline off the table as well because we're coming up
01:19PM 10 with the short form process, et cetera, and the only
11 people that this would affect would be people that
12 didn't file a short form to supersede their individual
13 complaint.

14 THE COURT: Is there any reason not to
15 extend it to January 15th so that we have everything on
16 file at the same time?

17 MS. GREER: That works for me.

18 THE COURT: Why don't we do that. Again,
19 that would be for the answer or responsive pleading
01:19PM 20 deadline for any case filed on or before December 20th
21 in which plaintiffs have not adopted the short form
22 complaint.

23 MS. GREER: Your Honor, I would just ask
24 that if for some reason there were 30 people who did not
25 opt in, if we could come back to the Court and ask for

1 more time on that because, obviously, responding to a
2 55-page, you know, multi-various complaint takes time.

3 THE COURT: All right. Let's cross that
4 bridge when and if we come to it.

5 MS. GREER: Thank you.

6 THE COURT: Peter, what is the timetable?

7 THE CLERK: The next status is January 10th
8 at 1:30, then the February one is scheduled for
9 February 13th.

01:20PM 10 THE COURT: It is now February 13th. When
11 would we move it to?

12 THE CLERK: The Friday before is
13 February 7th.

14 THE COURT: All right. It looks like we can
15 do February 6th or 7th, Thursday or Friday. I may have
16 a deliberating jury at that point, but 1:30 in the
17 afternoon?

18 MR. ELLIS: Which date, Judge?

19 THE COURT: Either February 6th or 7th.

01:20PM 20 MS. PARKER: I believe the 6th would be more
21 convenient. The plaintiffs' Bar meeting begins
22 February 7th, so the PSC may --

23 THE COURT: February 6th at 1:30. That's
24 rescheduling the February status conference which had
25 been I think the following week. All right. We might

1 as well set one for May.

2 THE CLERK: May 15th at 1:30.

3 THE COURT: May 15th at 1:30. All right,
4 thank you all for your patience. I have a number of
5 things under advisement. I'm going to try to work
6 through these as best I can and issue some further
7 orders. Thank you, all, and Merry Christmas to those of
8 who you celebrate, save travels to everyone, and I will
9 see you after the first of the year.

10 (Whereupon, the hearing was adjourned at
11 1:21 p.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing
transcript, Pages 1 through 110 inclusive, was recorded
by me stenographically at the time and place aforesaid
in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING
PHARMACY CASES LITIGATION and thereafter by me reduced
to typewriting and is a true and accurate record of the
proceedings.

Dated this December 30, 2013.

s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REPORTER